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FROM THE DECLARATION OF INDEPENDENCE TO THE CONSTITUTION

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The Roots of American Constitutionalism

Ed ted w tl an Introduction by

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THE ROOTS OF AMERICAN CONSTITUTIONALISM

I THE BACKGROUND OF POLITICAL THOUGHT

It is a common misunderstanding especially on the part of practical men to think that great historical events, such as the Declaration of Independence and the efforts at constitution making which followed it spring from social life and man's initiative like Athene from the forehead of Zeus. In point of fact, events of this type have a long seed time during which the ideas crystallize which eventually inform the actions taken. This observation does not oblige one to treat ideas as the only or even the major forces in history. Political and economic cultural and religious factors all play their vital part alongside the individual human being who is cast in the role of leader. But none of these other factors can come into play except by being channeled through human thought and this thought is molded by the ideas prevalent among those who are trying to figure out solutions to the concrete and practical problems confronting them.

The seeds which germinated before the American Revolution and burst forth into the great documents here under consideration were gathered over a long period of time. Indeed some of the crucial ones such as that men are created equal trace to the beginnings of Christianity and to the great thinkers of classical antiquity. That a good government should be a government of laws and not of men is a rhetorical exaggeration of the Aristotelian (as well as late Platonic) notion that a government should be operating according to law and was so operating whenever it was ethically sound. But it would be manifestly impossible to trace the basic ideas of Western political thought embedded in the American Declaration of Independence and the Constitution throughout the

I The General Idea of Constitutionalism

The idea of constitutionalism in the distinct Western sense was slowly distilled in the course of English revolutionary developments. Its antecedents reach back to the medieval doctrine of the supremacy of law But only when this law was understood as something man made and consciously conceived and explicitly formulated to deal with specific issues did it posit the problem of constitutionalism in its characteristic modern form. The traditional English notions are expressed in terms of a legislative power exercised by the King in Parliament. In this form they find their place in the political thought of Sir John Fortescue Sir Thomas Smith and Sir Edward Coke[2] All three of them are disinclined to differentiate the legislative function very precisely from the judicial function and this has given rise to acrimonious debate among scholars Some have held that the idea of parliamentary sovereignty was clearly embraced by Sir Thomas Smith[3] others have denied that there is any clear differentiation between the judicial and the legislative at all Neither of these views is right In point of fact, Smith expounded what Harrington came to call modern prudence—a scheme of constitutional go ernment in which the legislative power considered supremely important is entrusted to a corporate entity consist n of the estate of the King and the two further estates of the lords and commons all of which Smith believes to be present in the great court of parliament which represents all England collectively The problem of supremacy—or as it

Cf. S J h F rtescu *Governan f E l d* (1471) *La d bus Leg m A gl* (1468 70 P bl 1 3") S Th m Sm tl *D Rep Ll c A lorum* (1565 publ 1 83) S Edward Coke, *I t tes* (1628-41) esp V l IV

Cf F W M l nd *C nstit t al H ry f E gl d* (1909) pp 51ff S J mes Bryce *St d H ry d J risprud nc* (1901) I pp 5 L

Cf Ch les H M Ilwa *Th H gh C rt f Parliament d ts S p emacy* (1910) pp 1 ff., nd L Als I trod tio t his edition f *De R publ A glorum* (1906) pp xx ff

self preservation and happiness When Jefferson came to pen the famous triad of life liberty and the pursuit of happiness (in lieu of life liberty and property as well as happiness as the Virginia Bill of Rights [June 1 1/ 6] had it) he did not make as much of a change from Locke as is sometimes supposed. In Locke the lines bets een happiness and property are fluid partly because property does not in his *Second Treatise* have the narrow modern meaning of material possessions or even of a bundle of relations [6] but means instead all that rightfully belongs to a man and hence constitutes the ineluctable source of such happiness as he may achieve Pe cause of this concern with self preservation man readily enters nto society so as to make secure these en ls in peaceful association with others who are similarly moti ated

Men being as has been said by nature all free equal and independent no one can be put out of h s estate and subjected to the political power of another without his own consent which is done by agreein with other men to join and unite into a community for their comfortable, safe and peaceable liv ng one amongst another in a secure enjoyment of the r properties and a greater secur ty against any that a e not of t. And thus every man by consenting with others to make one body pol tic under one government puts himself under an obligation to every one of that society to submit to the determination of the majority and to be concluded by it [7]

This constituent act by which a pol tical society comes into existence and a civil government is formed is cruc al for the Lockean scheme of th ngs It stems from the Puritan faith in a fundamental covenant such as the Pilgrim Fathers executed on the Mayflower The terms of this compact are str ctly in line with the think ng that culminated in Locke a kind of thinking which dominated the revolutionary leaders in Britain until Cromwell despa red of his efforts at bringing

[6] Wal on H milton, "P operty I E n lop d f th S l Sc

[7] Locke Th Se ond T tise f Governm t ed ted by Th ma P P ard (The Library f Liberal Arts N 31 [New Y k Th Liberal A ts Pres Inc]) Sectio 9 pp 54 55

into existence a constitution built around a formally divided legislative. The "Agreement of the People" (1647) has frequently been hailed as perhaps the first modern "constitution." It was a growing conviction among Puritans and other Englishmen that a civil government could be instituted by fiat of the constituent will of the people based upon rational principles of government. If such rational principles could be discovered to be embodied in a traditional system, so much the better for all concerned. Locke's triumphant demonstration that this was the case in England had much to do with the vogue of his treatise.

But Locke had laid the foundation for the American enterprise. We read in the Declaration of Independence that "in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another," and furthermore that it may also become necessary "to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and Nature's God entitle them." Such phrases were indeed an echo of Locke's statement of the right of revolution. "There are," he wrote, "no examples so frequent in history as those of men withdrawing themselves and their obedience from the jurisdiction they were born under ... and setting up new governments in other places." [8] And again he asserted that "no man or society of men has a power to deliver up their preservation or consequently the means of it, to the absolute will and arbitrary dominion of another," [9] and "therefore whenever any one shall go about to bring them into such a slavish condition, they always have a right to preserve what they have not a power to part with." [10] Therefore they may "rid themselves of those who invade this fundamental, sacred, and unalterable law of self-preservation." [11]

This self-preservation was closely bound up with the right of private property. Property had a very broad meaning, as we just showed, but it also had the very specific and narrow

8 *Ibid.*, Sec. 115, p. 66.
9 *Ibid.*, Sec. 149, p. 85.
10 *Loc. cit.*
11 *Loc. cit.*

-ning which is associated with it today To take property without a man's consent was one of the most heinous acts of arbitrary government whether this act was agreed to by a parliament or not was of little consequence when that parliament did not represent those whose property was being taken Locke is insistent upon this point even though he stresses at the same time the binding obligation springing from the decision of the majority once a man has come to acquiesce in his role as a member of the community

At this point Harrington's thought supplemented Locke's in providing an armory for the revolutionaries For whereas Locke in spite of his general recognition of the right of revolution had stayed essentially within the framework of traditional English constitutionalism Harrington constructed his *Commonwealth of Oceana* (1656) from rational principles as he perceived them without any concern for the traditional pattern We find in Harrington an analysis of the problem of government that leads him to the well known statement that a commonwealth consists of the senate proposing the people resolving and the magistracy executing He interprets this in the classical tradition as a mixed form of government partaking of aristocracy democracy and monarchy and therefore complete [12] A commonwealth is for Harrington always a government of laws and not of men He never wearies of repeating this basic insight which assigns to the wise and intellectually superior the role of discussing the problems to the people as the compound of all the divergent interests the role of making the basic decisions and to the magistrates the task of enforcing and executing these decisions. It is evident that once representation of the people in a popular assembly is added the American scheme of a government based upon the separation of powers is delineated. This government comes into existence by the people's constituent act when they organize the government in accordance with these principles

[12] James Harrington The Commonwealth of Oceana (ed T lad 1900) pp 4 ff

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1 James H rrmg The C mm lth f O na (ed. T land 1 00) pp 45ff

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8 *Ibid* Sec. 11 p 66
9 *Ibid* Sec. 149 p 85
10 *Loc cit*
11 *Loc cit*

tesquieu went to En land to observe the workings of British government. In any case Montesquieu cherished a pre conceived not on in favor of an independent ju liciary such as he himself knew in France and which was still opera t ve there though in a very limited way Locke had not em phasized the judicial pow er To him it was rather important to stress the legislative authority of parliament and so he assigned to the crown most of the judicial power under the heading execution of the laws Montesqu eu was most de termined to vindicate the separate status nd basic importance of this pow er of which he wrote the famous description that it is *dans une façon nul* that is to say in a certain sense noth in s Now as a matter of fact there had taken place in England s constitutional evolution a step which fitted right nto Montesquieu s notions and that was the Act of Settlement by which the jud ciary was made independent throu h the well known njunction that judges hold their office *qu amdiu se bene ge serint* (as lon as they conduct themselves well) So Mon tesquieu would seem to have been justif ed in modifying the Lockean scheme by a clear recognition of this pow er as sepa rate and distinct

Now while the executive pow er becomes the judicial pow er the federative power which in Locke s system had been the power of war and peace that is to say over fore gn policy is by Montesquieu expanded to become the executive power Th s Montesquieu accomplished by associating the problem of nternal w th that of external security and thus merg ng the dea of police methods for ma nta ning internal peace and o der with the idea of devi ng means for insur ng safety from external ggress on This new execut ve po er corresponded of cour e much more nearly with modern conceptions than Locke and indeed it was der ed f om and informed by con t nental Eu opean pol t cs and government in the days of benevolent despotism and mercantil sm

Cf Lock P t Sec. 143 14 149 L6
Cf les de Sec ndat B d M esq eu Sp t f th La tra l
T m N gent XI Cl VI

2. The Separation of Powers

Such then was the nature of the concept of constitutionalism which America had evolved from the speculations and practices of the past. A second cornerstone of the edifice of political ideas which America had constructed was the idea of separation of powers, and it therefore becomes important to sketch the way in which this doctrine developed prior to its reception by the writers of America's fundamental law.

The idea of the separation of powers emerges from the much older notion of a mixed form of government which goes back to Plato and Aristotle and was elaborated by Polybius. It is fascinating to watch this ancient idea being transformed into the related but different modern concept. The role of the English parliament is vital in this connection, as is the emergence of the emphasis upon legislation already noted. For Locke the real concern is not that of separating the powers or functions (which had actually been more clearly divided by Sir Thomas Smith), but of dividing the legislative power because it is so very important. What is of primary importance is to prevent the legislative power from being abused, and that can only be done by making king, lords and commons share in its exercise. The other two powers or functions which Locke identifies, namely the executive and the federative, are not so important; hence he is quite content to entrust them to the monarch who also possesses a residual power of the prerogative. This rather primitive scheme of a separation of powers was radically revised and rationalized by Montesquieu. Montesquieu has often been taken to task for not perceiving the emergent pattern of British parliamentary government. Such critics overlook that this scheme of things was actually looked upon by many of the contemporaries as a kind of corruption[1] and certainly was not very fully developed, let alone stabilized and legitimized when Mon-

[1] E.g. Henry St. John, Viscount Bolingbroke, *A Dissertation upon Parties* (1735-4).

he was his various governmental powers appear to be so completely occupied with checking and balancing each other that little power is left for the primary task of governing The same passionate faith in the constructive powers of society as against the purely repressive function of government is set forth by Thomas Paine. Society in every state is a blessing he proclaimed in *Common Sense* (1775) but government even in its best state is but a necessary evil in its worst state an intolerable one [7] The ringing phrases of the pamphlet culminate in a very DECLARATION FOR INDEPENDENCE which stems from a withering attack upon the British constitution The British constitution is described as a senseless compound of remains of monarchical tyranny remains of aristocratical tyranny and republican materials [8] It is so exceedingly complex that no one knows what he is at. To say that the Constitution of England is a *union* of three powers, reciprocally *checking* each other is farcical either the words have no meaning or they are flat contradictions [9]

He explores this farce he surveys the recent conflict with Britain and he cries out Everything that is right or reasonable pleads for separation The blood of the slain the weeping voice of nature cries *Tis time to part* [10] He reinforced this thought later in his *Rights of Man* (1791—first published in French) The continual use of the word *Constitution* in the English Parliament shows there is none if there were a constitution it certainly could be referred to and the debate on any constitutional point would terminate by producing the constitution Here we have the conceit of many writers and thinkers of th time the result of the r lack of semantic sophist cat on if you write a constitution its meaning will be self-evident Paine speaks f r a wide spread movement in Eng

[7] *Thomas Paine Common Sense and Other Political Writings* edited by Nelson F Adkins ("The American Heritage Series" No 5 [New York The Liberal Arts Press 1953]) p 4

[8] *Ibid*. p 7

[9] *Ibid*

[10] *Ibid* p 23

[11] *Rights of Man* Part I Miscellaneous Chapter (cf *Thomas P* ... edited by Harry Hayden Clark [New York American Book Company]) p. 151

This distinction of the several functions is in fact rationally based upon the differentiation of the types of decisions which man is called upon to make namely to formulate general rules to adopt specific and particular actions or measures and to adjudicate between conflicting interpretations of general
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When eventually John Adams came to elaborate the ideas of Montesquieu in terms of a complex pattern of separated and mutually checked and balanced powers it became clear that the fear of government had become so great that the separation of powers was now very nearly the concept of a state of nature[6] Ardent believer in orderly government that

[4] For further detail see Fr edr h Const tut o l Government d Democracy (19 1) Ch X

[5] Cf Thomas Woodrow Wilson C gres nal Government (18)

[6] Cf J hn Adams, *A Defence f the Con t t t on of G v ment of the Un t d States of America* (1 96-8). Cf lso Zoltán H r tl *Joh Adams and the Prophets of Progr s* (19) esp Ch VIII

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[7] *Th ma P ne C mmon S nse and Other P l t l W t g* ed ed b Nelson F Adk ns ("Th Amer ca Heritage Ser es N 5 [New York The Liberal A ts P ess I c.]) p 4

[8] *Ib d.* p 7 [9] *Ib d* [10] *Ib d* p 3

[11] *R ghts f M* P rt I "M sc ll neous Ch pter (cf. *Th mas P* ed ted bv Harry Hayden Cl rk [New Y k American Book Comp y]) p 151

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When eventually John Adams came to elaborate the ideas of Montesquieu in terms of a complex pattern of separated and mutually checked and balanced powers it became clear that the fear of government had become so great that the separation of powers was now very nearly the concept of a state of nature[6] Ardent believer in orderly government that d

[4] For further details see Friedrich *Constitutional Government and Democracy* (19 1) Ch X

[5] Cf Thomas Woodrow Wilson *Congressional Government* (188)

[6] Cf John Adams, *A Defence of the Constitutions of Government of the United States of America* (1 86-8) Cf also Zoltán Haraszti *John Adams and the Prophets of Progress* (19 2) esp Ch VIII

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[7] *Thomas Paine Common Sense and Other Political Writings* edited by Nelson F Adkins ("The American Heritage Series No 5 [New York The Liberal Arts Press, Inc]) p 4

[8] *Ibid* p [9] *Ibid* [10] *Ibid* p 43

[11] *Rights of Man* Part I Miscellaneous Chapter (cf *Thomas Paine* edited by Harry Hayden Clark [New York American Book Company]) p 151

land and on the Continent Americans in acting upon it were not doing something out of line with prevailing European thought but distinctly intended to be an expression of it.

The argument which Paine is combating is of course that of Burke. Burke had exalted the British constitution based upon the prescription of long usage; Burke had denounced the proclamation of abstract rights in the name of a presumption in favor of long established privilege.[12] Said Paine:

Every age and generation must be free to act for itself *in all cases* as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of tyrannies.[13]

Government is man created, and man will do away with it when it fails to do what it was set up to do. In keeping with Locke's already considered opinion, Paine claimed that the instant formal government is abolished society begins to act: "A general association takes place, and common interest produces common security."[14] Formal government, he thought, made but a small part of civilized life, and "the more perfect a civilization is, the less occasion has it for government, because the more does it regulate its own affairs and govern itself."[15] In these radical pronouncements a clearly anarchic strain appears; somehow a free association is pictured as capable of effective action, yet at another point he himself acknowledges "that government is nothing more than a national association acting on the principles of society."[16]

3. The Natural Rights of Man

Now among these principles of society the most important, in the eyes of the American revolutionaries no less than in those of Thomas Paine, were the natural rights of man, and the concept of rights is the third premise of American political thought which we must consider. The Declaration of Inde-

[12] Edmund Burke, *Reflections upon the Revolution in France* (1790).

[13] Thomas Paine, *Common Sense and Other Political Writings* (Ad[illegible]k[illegible]) pp. 6-[illegible]

[14] *Ibid.*, p. 117.

[15] *Ibid.*

[16] *Ibid.*, p. 190.

pendence is explicit on the subject and the Constitution was not adopted until the addition of a Bill of Rights was pledged. We have already remarked h

Engl h n

been the preceding century and a half The great age of natural Grotius to Hume natural law had offered itself not only as a principle for justifying revolution as in Locke but as a principle for justifying absolute authority and monarchical government Indeed by the time the Declaration was composed natural law had become a commonplace of general argumentation and its philosophical foundation had been undermined by Hume From it Thomas Hobbes had deduced a long list of rules of prudence and the absolutists of a later day had sought to argue from it for some rational restraint to be observed by benevolent rulers

But the key idea was that of the sacred sphere of human right which no government invades but at its peril The toleration on which John Locke preached was but a concluding sermon in which a century's protracted arguments over religious freedom were summed up just as his spirited defense of the right of private property summarized the notions concerning economic freedom that had developed in the struggle against royal absolutism. It was only natural that once the right of freedom in the sphere of religion and property should have crystallized, others should make their appearance These rights which were set forth in most of the state constitutions framed after the Declaration of Independence were always treated as inherent, that is to say as basically related to man's very being and dignity Certain procedural safeguards had already figured prominently in the days of Sir Edward Coke had been the center of the Petition of Rights (1628) and continued to be looked upon as a birthright of all Englishmen Thus the right of an accused to be brought before a judge and to hear what is the accusation levelled against him to be confronted with witnesses to have a speedy trial by an impartial jury

and to be free from compulsion to give evidence against him self—in short that a man may not be deprived of his Liberty except by the Law of the Land or the Judgment of his Peers as the ancient formula went—all these rights were now linked with the religious and property rights into one comprehensive package To it were added freedom from searches and seizures and even the freedom of the press and of peaceable assembly among others

The recognition of these basic rights is intimately associated of course with the rise of constitutionalism and its theory Only when the idea of a limited government had firmly taken root could the concept of such rights be fully implemented The very complaints which the Declaration voiced as demonstrating the tyrannical character of the rule of George III are formulated as violations of these rights The most comprehensive philosophy of these rights in terms of natural law was formulated by the philosopher Christian Wolff who in his *Institutions of the Law of Nature and Nations* (1750) noted equality and a right not only of security and self-defense but also of punishing a wrong doer His thought traces clearly back to Locke The trenchant criticism levelled by Hume at the concept of natural law and rights seems little to have affected the writers of the Constitution In John Adams view Hume was a wise fool a learned idiot a profound deep-thinking coxcomb [1] but Hamilton thought him solid and ingenious (sic) [2]

1 Hara ili op cit p 14

Cf *The Feder l t* N 85 where Ham lton quotes the f ll wi g passage "To bal n a large t t o soci ty wh the m nar h cal r rep bl can on general laws a wo k of so gre t d ff c l th t no l um n g n u l wever comprehens l abl by the m re d t f r ason an l reflect on to effect it The judgmen of m ny m t nt in th w k exper ence must gu de the r l bor me mu t be t t perfect n and the feeling of incon en nces m t correct the m takes wh h th y Ine tably fall into in th ir first tr l nd per m nt (Of the Rise and Progress of the Arts and Sciences reprinted in David *Hume's Pol t cal Essays* ["The Library of Liberal Arts No 34 New York The Liberal Arts Press Inc]) pp 111ff.

Georg Jellinek has argued persuasively that the preceding natural law doctrines and the ideas of the enlightenment were insufficient for explain ng the idea that these rights should be solemnly *decla ed* Stressing the Lockean antecedents is not enough In such a work as James Otis *The Rights of the Colonies Asserted and Proved* (1764) these rights are transformed so Jellinek insists into *subjective rights* [3] These rights are not conferred by the state but are possessed by the individual against the state And since England sought to invade them the idea now appears that these rights should be solemnly proclaimed. It was so done at Boston in 17 ? and again at Philadelphia in 1774 It is to be doubted however whether the distinction between objective and subjective rights is really important. The Petition of Rights in 1628 had stated the four rights which it vindicated as rights of all free Englishmen and had solemnly proclaimed them But the Declaration in America broadened them from the prescriptive rights of Englishmen into human rights of universal application

4 Federalism

The Articles of Confederation and the Constitution are both built upon the idea of federalism and it is worth inquiring whether there are significant antecedents for this important doctrine It often alleged that federalism constitutes a wholly novel attack upon problems of government, especially as propounded in *The Federalist* No one would have been more surprised than Madison to hear any such claim made For he made an extensive review of past federal experience and *The Federalist* shows very clear signs of the Constitution having been written in the light of these experiences and their theoretical formulations

The theory of federalism is a difficult subject. Gierke has linked it with the Germanic corporate theories of free and

[3] Georg Jellinek *Die Erklarung der Menschen- und Bürgerrechte* (4th ed. 19??) Ch. IX esp pp 66ff.

and to be free from compulsion to give evidence against him self—in short that a man may not be deprived of his Liberty except by the Law of the Land or the Judgment of his Peers as the ancient formula went—all these rights were now linked with the religious and property rights into one comprehensive package To it were added freedom from searches and seizures and even the freedom of the press and of peaceable assembly among others

The recognition of these l ic righ t i intimatel associated of course ith the rise of nstituti nali n an l it theory Only hen the idea f a l m te l in ment had firmly taken root could the concept f u h right t f ill implemented The very complaint h h the D l t t ed is lemon strating the tyrannical chara ter f the rul f George III are formulated as violati ns of thes right The e t t compre hensive philosop hy f the e right in term f n tural l was formulated by the phil pher Christian W lff in his *Institutions of the Law of Nature and N t* (1 50) noted equality and ri ht n t l r ty n l sell tence but also of punishing a r ing l er H tl her learly back to Locke The tren har t r ti n le l e l l Hence it the concept of natural la at l right e l itl e affected the writers of the Con titut n In J hn A l Hume was a wise fool a learned l l t t f n l deep thinking coxcomb but Hamilt n th ught him sel l n l ingenuous (sic) [2]

1 H ra t p t p 14 w re H l n q f ll w g
Cf *The F der ist* N w h l r m n
passage To b l n l rge w k w l nd
republ can on g n l l ws bl l l w k
gen u l wer compreh n f l ta em
reflect on to ffect t The l tgm l h l h h they
exper nce m t gu d th l ts f m Of
and th feel ng of ncon en es m n Dead
Inev tabl fall n th tr l l No l New
the Rise and Progress f h Art f L ort A
Hume P l t l *Essays* [Th Lib ary f L
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But there [illegible] Althusius in spite of the fact that he was the most comprehensive political [illegible] by orthodox Calvinism. His work had [illegible] neglect Instead they had before them the [illegible] importance of intermediary power [illegible] Montesquieu [illegible] loped Althusius had held that [illegible] monarch [illegible] as apt to turn into a [illegible] tism [illegible] mind well be [illegible] the theory of federalism. Indeed had such a the [illegible] at the time it might have served as it does [illegible] the underlying for a federal association with the mother country [illegible] the idea of popular sovereignty which we have examined when combined with the right of revolution and [illegible] right spelled independence rather than federal bonds.

The modern theory of federalism arose from the compro-

[1] Otto [illegible] Gierke, Johannes Althusius [illegible] rechtlichen Staatstheorien (1[illegible] and later) translated by Freund under the title The Development of Political Theory (1939) Ch. V [illegible] Althusius

Cf. C. J. Friedrich, Politica Methodice Digesta of Johannes Althusius, esp. the Introduction (1932)

mises which were worked out in the course of the constitutional labors at Philadelphia These compromises themselves were not the result of theoretical speculations but of a hard headed concern with the practical exigencies What the constitution makers aimed at was a federal union strong enough to provide an effective government and yet limited enough to leave ample scope to the several states for a political life of their own This of course had been precisely the aim of those who undertook to build up the Swiss Confederation and later the United Provinces of the Netherlands Hence their practical experience was valuable in fact it embedded the kind of earlier constitutional thinking that had interested Althusius who studied in Switzerland and spent most of his life in the city of Emden which was closely associated with the Netherlands Indeed his theories were so congenial to the Dutch that they made several efforts to secure his services So a thread runs to the American constitution from these earlier efforts but it is a thin one

5 *The Problem of Democracy*

If federalism emerged from the constitutional work done at Philadelphia the same cannot be said with equal certainty of democracy The later development of the United States into the largest and most powerful democracy ever to come into existence has tended to obscure the fact that it was not so at the beginning Indeed the makers of the Constitution were sharply divided on the issue Many of them shared the eighteenth-century prejudice against democracy Notably Hamilton but others as well thought of the people as a rather dubious repository of political power *The Federalist* is full of such animadversions as the gusts of popular passion and the like But there were others of course notably Benjamin Franklin who wanted a democratic constitution and did their best to secure it

Democracy had not, until then been a highly regarded form

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But there ... ...n... ...h... ...th... ...th... ...m... ...c... mpre Althusius ...n ...pte... ... ...rth... ...x Cal hensive politi... ... ...neglect

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Ott... C... ...ke... J... h... ...tran... ...Freud under the ...hl... en Sta... ...h... ...(1939) Ch... ...ie The Development of P... ... ...Cf C. J. F... ... ...the Introduction (1935)

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have referred to the Agreement of the People[1] before That in all laws made or to be made every person may be bound alike and that no tenure estate charter degree birth or place do confer any exemption from the ordinary course of legal proceed ngs whereunto others are subjected —this equality before the law was one of the native rights stressed there But the Levellers[2] carried the idea further The dom inant elements more especially Crom ell did not accept such notions John Milton and other ideologues like Harrington bitterly denounced democratic leanings as destructive of a common ealth But quite a few of those who had a penchant in this direction ent across to America. In John Lilburne s writ ngs we find much of what was alive in America as democratic principles by the time of the Declaration In his *The Free man s F e dom Vindicated* (1646) we find such sharp phras ngs as this And unnatural irrational sinful wicked unjust devil sh and tyrannical it is for any man whatsoever spiritual or temporal clergyman or layman to appropriate and assume unto himself a po er authority or jurisdiction to rule govern or reign over any sort of men in the world without their free consent Th s was not a generic con sent either of a people composed of the upper classes but the mass of the s mple f lks portrayed in *Pilgrim s Progress*[3] Time and time again the Levellers raised their voices for all the common people of England aga nst first the elite of the Presbyterian parliamentari ns and then the revolutionary elite of Cr mwell and his commonwealth men The Council of the

[1] An greement between th Independents nd the Levellers outl g commo program f pri ples d tio n p rsu g th ms f th Rev l u n. (Cf. P ri ism d Lib ty ed ted by A. S. P Wood h se [Ch ca Th L ers y f Chicago Pres 1951]) p 444 1649

[2] A p rty which ros th rm f th Lo g P l ment bout 1647 left f center Mor radical d mor secular i the pol t cal th k g th n the Independents th Levellers d oca ed levelling of all ra ks. (Cf Wood h use *op cit* esp th Introd ction.)

[3] B yan *Pilgr m P gress From This World t Th t Which is to C me*

commission who intermeddles with that which cannot be given him in commission from the people [10]

Ideas such as these were expounded by an ever-expanding stream of voices in Colonial America including the non Puritan colonies of the South until by the time Jefferson came to compose the Declaration they had swollen into a mighty chorus That is why Jefferson could later say that these ideas seemed to be the common sense of the matter

If one reviews the over all course of American thought as embodied in the Declaration of Independence the Articles of Confederation and the Constitution one is bound to conclude that the ideas are not new Whether one considers constitutionalism as such or the related notions of a separation of powers rationally based of human rights derived from natural law of federalism and of democracy they are part and parcel of the great heritage of Christian Europe As Carl Becker has said in his remarkable study of *The Declaration of Independence*

In political theory and in political practice the American Revolution drew its inspiration from the parliamentary struggle of the seventeenth century The philosophy of the Declaration was not taken from the French It was not even new but good old English doctrine newly formulated to meet a present emergency [11]

This fact of its linkage with the European heritage is not a weakness but a point of decided strength in the past as well as at the present time and in the future

6 *The Prerevolutionary Controversy*

The course of history that culminated in the Declaration of Independence and the Constitution can be traced back as we have seen to its roots in the ancient tradition of the western world but the immediate stimulus for this upsurge of revo-

[10] *Th Bloudy Tenent y t m Bloud* (pri ted n N rra ansett Cl b Publ cat ons IV 18")

[11] Carl Becker *Th Decla t I I d p denc* (1942) p 9

most a century the mother country had pursued toward the colonies a policy that Burke called salutary neglect and America as might have been expected had developed a national character while England was looking the other way. Now the American mind was emerging to take its place on the stage of world history and some knowledge of it is important to an understanding of the institutions it fashioned.

The American spirit as the British ministry might have perceived had it troubled to examine the matter had become something very dissimilar to the England of George III. It was a complex of diverse strains and influences many of them drawn from England in the first instance to be sure but shaped and tempered for the past 150 years in a quite different crucible. It was a spirit rich in strange virtues and—to the Englishman—even stranger prejudices ridden by a multiplicity of contradictions which accounted at once for its attributes and its deficiencies. Like John Adams who became one of the makers of the Revolution and the second President of the United States America was both vain and unsure of herself. Like Benjamin Franklin who skilfully represented the American cause abroad and earned the deep respect of Europe's two most powerful capitals the nascent republic was both homespun and philosophic both pragmatic and speculative. Like John Dickinson who helped foment the revolution with his pamphleteering then opposed the Declaration of Independence and finally enlisted as a private in the revolutionary army the American mind was at one and the same time staunchly traditionalistic and profoundly libertarian. And above all like Thomas Jefferson who was to write the Declaration and to hold nearly every important public office in the gift of his country that country was content to live with her inconsistencies rather than to resolve them.

To understand these characteristics—and most particularly the last—is to understand much about the history of the three decades that followed the Stamp Act and not a little about the subsequent development of the nation. Conceptual patterns that are sound enough when applied to other data break

down when we seek to impose them on the intellectual his-
tory of the United States The familiar story of thesis and anti-
thesis struggling toward synthesis is doubly false for America
first because the cleavages such a viewpoint postulates so often
turn out to be agreements when we examine them closely and
secondly because the contradictions that do exist are tolerated
and allowed to live side by side in the American mind
It is not quite correct to say that the American spirit was
indifferent to its diversities when a contradiction was capable
of easy resolution then America gladly resolved it But when
a synthesis seemed unnecessary or difficult or both there was
[illegible] desire to press forward to accomplish it in the name
[illegible] Rather America was prone to let the discrepan-
[illegible] joined together in [illegible] marriage of opposites that
[illegible] completely uneasy
[illegible] re are the characteristics of the American spirit
[illegible] thfully illustrated than in the contr[illegible] that pre-
[illegible] the Declaration of Independence The [illegible] were
[illegible] entful of [illegible] like the Stamp Act and ill-dis-
[illegible] tolerate the principle of British interference in Amer-
ternal affairs Long years of self-rule had taught them
[illegible] k of autonomy [illegible] privileges but [illegible] right
[illegible] ury and a half of [illegible] frontier experience had
dered a deep [illegible] liberty [illegible] and a hypersensitive dread
[illegible] anny Many of them felt rightly or wrongly that the
[illegible] tical advantages of union with England were not enough
[illegible] compensate them for any substantial diminution of politi-
[illegible] and economic freedom Their instinct [illegible] was to
[illegible] est and even resist the British legislation [illegible] and the
[illegible] mp Act Congress of 1765 resolved that the British tax had
manifest tendency to subvert the rights and liberties of the
[illegible] onists The British ministry were willing [illegible] to repeal
[illegible] Stamp Act itself and they did so But England would not
cept the colonial insistence that Parliament [illegible] the
order to impose such exactions on America [illegible] and
in 1766 the Declaratory Act was passed reasserting the doc-
trine of parliamentary supremacy Since this was the very

doctrine which the liberty minded colonists could not accede to the conflict of viewpoints would appear on its face to have been irreconcilable

A more radically logical people might have concluded at once that the only course open was the highway of revolution But the past of the colonists while teaching them to love liberty had also bequeathed them a solid veneration for the rule of law a veneration all the greater perhaps because the yoke of the law had always rested so lightly on their shoulders They desired liberty which they felt was their moral due but with almost equal fervor they desired to behave legally The assertion of parliamentary supremacy loomed as a threat to one or the other of these American ideals it appeared that a choice must be made between them

Characteristically however America elected to evade that choice and colonial polemicists began to insist that their opposition to British claims was *both* libertarian and legalistic, that in law as well as in morality Parliament had exceeded its powers The search for precedent to buttress this argument kept many an American lamp burning for long hours and provides us with an early and excellent example of the creative legalism that was to play such a significant part in the later history of the American nation The colonists like good lawyers the world over piled their arguments on top of one another on the sound theory that if one did not suffice the next might They argued that the charters which provided the frames of government for the colonies had been granted to them by the king and that they were subject only to the will of His Majesty Parliament they said had no authority to encroach on the charter rights which the king had bestowed. As Alexander Hamilton put it in 1774

> Our charters the express conditions on which our progenitors relinquished their native countries and came to settle in this preclude every claim of ruling and taxing us without our assent.

Moreover said the colonists even if the charters did not

and the mother country that is strikingly similar to e theory of the modern British Commonwealth of Nations. g others James Wilson one of the most learned of evolutionary statesmen and later a Justice of the United — Supreme Court undertook to show that this position was supported by the traditions of English constitutional law and was able to marshal a fairly impressive array of precedents to document his contention.

Whether these dicta were technically sound whether they would withstand rigorous examination as legal principles—this matters very little in the light of subsequent events What does matter about these arguments is that the colonists felt compelled to make them and that they were advanced earnestly and repeatedly and never really abandoned. For the colonists these legalistic polemics had the greatest significance because they seemed to provide a link between their traditional and conservative devotion to the rule of law and their instinctive thrust toward liberty There were men in the colonies who would have been willing to forego legality in order to achieve separation and there were others who would have sacrificed liberty in the name of fealty to the mother country But the majority of thinking men in America wanted both freedom and legality and they moved toward revolution with the greatest reluctance stopping constantly to reassure themselves that they were not revolutionists after all They thought of themselves not as mutineers but as sober and reasonable defenders of traditional freedom If they were bent on a revolutionary course it would be they felt a revolution by due process of law And characteristically they could see no reason for believing that these objectives were incompatible

However as relations with England steadily worsened during the 1770s the colonists found it increasingly difficult to maintain a moderate stand the logic of history swept them inexorably toward the Declaration of Independence It was hard for these men to reconcile themselves to the necessity for such an act hard for them to relinquish the idea that legal suasion would ultimately win the day But the intran

although the sentiment in favor of outright separation from England was plainly growing, this convocation was still ruled by moderate counsels and capped its deliberations by reaffirming the allegiance of the Americans to King George. His Majesty responded by declaring officially that the colonies were in a state of rebellion. In retrospect, it seems hard to believe that Americans could, in the face of this royal declaration, continue to resist the movement for separation, but it required a bombshell to dislodge them from their position of hesitant moderation. That bombshell was supplied by Thomas Paine, who published *Common Sense* in January 1776.

For Paine the problem that had been vexing America was simply solved. Government, he said, is based on no other justification than the freedom and security of the governed. British rule over America offered the colonists neither freedom nor security but only tyranny and exactions; therefore America should renounce allegiance to "the royal brute" of Great Britain and should go her own way. It was an unqualified appeal to the principle of self-interest, to the principle of popular sovereignty, rejecting as fatuous all the sentimental ties that had so far bound America to the crown. And the effect of the pamphlet was electric. Printing presses ran night and day to supply the popular demand; at least 500,000 copies were sold in the next six months; nearly every adult in the colonies had read *Common Sense* or heard it read to him. Everywhere it converted its readers to the cause of independence. It produced almost overnight a wave of antimonarchical feeling that was not to abate until the question of monarchy had become academic in America. It tore away the fabric of veneration toward the motherland that had existed for more than a century. When the smoke had cleared, it was evident that the popular will in America was at last firmly set on a revolutionary course.

Paine undoubtedly kindled the spark that led finally to outright rebellion and separation. His contempt for tradition, his straightforward appeal to the unadorned principle of popular

sovereignty his lack of concern for the legal tortuosities that had preoccupied the colonists had a refreshing and revitalizing effect on the American mind But this is not to say that the spirit of America was remodeled in the image of Tom Paine Paine taught the colonists where their interests lay and his fiery prose gave a powerful stimulus to the movement for popular sovereignty The doctrine of popular consent was henceforward unchallengeable in America But Americans nevertheless did not interpret that doctrine in strict simplistic terms such as Paine's Even when they had accepted the need for revolution they clung to their old affection for traditional ism and legality and when the Declaration of Independence came it took a form that reflected both the libertarian and the traditionalistic elements of the American character It was an appeal to a candid world pregnant with the philosophic generalities inherited from Harrington and Locke explicitly resting on the will of the people but underneath this radical philosophic surface an alert ... the outlines of the familiar legal argument ... Americans had not abandoned their ... that the ... was legally defensible the ... that it was philosophically ... subordinated tradition to a single ... popular sovereignty they had merely ... ratified the decisions of the p... ...

II THE ADOPTION OF THE DOCUMENTS

1 *The Declaration of Independence*

On June 7 1776 Richard Henry Lee of Virginia acting under instructions from the Virginia Assembly offered to the Continental Congress a resolution for independence Even at this late stage with commercial intercourse between England

and America interdicted and the clash of arms resounding along the eastern seaboard the oppos

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ulson supported by James Wilson and others leading the opposition On June 10 the debate was recessed for three weeks so that the delegates could return to their states for new instructions Meantime a committee was designated to draw up a Declaration of Independence so as to have it ready in case the final decision in favor of separation was made The committee consisted of Benjamin Franklin John Adams Roger Sherman Robert Livingston and Thomas Jefferson who was made chairman Its members discussed the general character of the appeal that should be produced and then asked Jefferson to compose it In two days Jefferson had completed the task on July 2 the Congress voted to pass Lee s resolution of independence and on July 4 the Declaration itself was issued to a candid world.

The document that issued from Jefferson s felicitous pen was a mirror of the contemporary American spirit In later years Jefferson himself said that he had simply been trying to place before mankind the common sense of the subject in terms so plain and firm as to command their assent it was intended to be an expression of the American mind And that is indeed what it was Its list of grievances was a recapitulation of the controversies of the preceding decade its basic premises were a compound of popular political philosophy and concrete American experience.

What were these premises? First there was the concept of natural law as the fundamental basis for the rights asserted a concept implicit in Jefferson invocation of the laws of nature and of Nature s God. To Jefferson and his like minded contemporaries there was nothing strange in the assertion that the truths of the Declaration were self-evident. The ancient and essentially ethical tradition of natural law stemming from Cicero and his predecessors had merged in American

sovereignty his lack of concern for the legal tortuosities that had preoccupied the colonists had a refreshing and revitalizing effect on the American mind But this is not to say that the spirit of America was remodeled in the image of Tom Paine Paine taught the colonists where their interests lay and his fiery prose gave a powerful stimulus to the movement for popular sovereignty The doctrine of popular consent was henceforward unchallengeable in America But Americans nevertheless did not interpret that doctrine in strict simplistic terms such as Paine s Even when they had accepted the need for revolution they clung to their old affection for traditionalism and legality and when the Declaration of Independence came it took a form that reflected both the libertarian and the traditionalistic elements of the American character It was an appeal to a candid world pregnant with the philosophic generalities inherited from Harrington and Locke explicitly resting on the will of the people But underneath this radical philosophic surface an alert observer can trace the outlines of the familiar legal arguments as well Americans had not abandoned their insistence that the colonial cause was legally defensible they had simply added the premise that it was philosophically defensible too They had not subordinated tradition to a single minded insistence on popular sovereignty they had merely learned to contend that tradition ratified the decisions of the popular will

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thought with the modern Newtonian conception of a universe subject to the laws of physics and it therefore seemed reasonable that the laws of the moral world like those of the physical world would be revealed to him who looked closely at the book of nature. In their [illegible] experience Americans felt they [illegible] the proposition [illegible] natural order of Locke [illegible] seemed [illegible] above a reasonable [illegible] the environment [illegible] had come to know [illegible] granted until the British [illegible] had disturbed it [illegible] familiar state [illegible] indeed it would have been [illegible] And this being the natural [illegible] thought that it [illegible] something a transition [illegible] which was a commonplace [illegible] tantalizingly illogical [illegible] starting point

With this [illegible] fell in line the [illegible] rent that like [illegible] sertion all men [illegible] ceeding was to be [illegible] took years and to [illegible] now it to me [illegible] popu ment [illegible] that lists of [illegible] ignoman's opin[illegible] ratic the recognition [illegible] kind rance between [illegible] ought Jefferson [illegible] con They meant [illegible] the m[illegible] Christianity to be equal in the [illegible] cept of spiritual equality [illegible] ideal and insisting that the time had [illegible] birth by erasing legal privileges based on the [illegible] Again they were aided in reaching this point by the circumstance that the principle of equality was already rooted in

their experience On the frontier which lay only a few short miles from the doors of even urban Americans artificial distinctions betveen men tended to dissolve in the common struggle for subsistence

Secondly it is self-evident that men are endowed with the unalienable right to life liberty and the pursuit of happiness Again as with all of this it is only necessary to turn to Locke to find the point of reference Jefferson later said that when he wrote the Declaration he referred to no book not even Locke s *Second Treatise* and this fact is a measure of that book s influence on him and his contemporaries The ideas and even the phrases of Locke had become so deeply imbedded in the thinking of educated Americans of the period that they came to mind unbidden Even Jefferson s use of the pursuit of happiness as the third term in the triumvirate of basic rights instead of Locke s term estate was not, as has been pointed out above necessarily a departure in meaning Stylistically pursuit of happiness is unquestionably better and it may have been no more than an instinct for a graceful phrase that caused the substitution

From here on the philosophy of the Declaration follows the classic eighteenth-century line Since these rights cannot be maintained in practice without social organization men agree by social compact to establish a government to secure them Thus the principle of popular consent is introduced Since this consent based government has no justification beyond the protection of rights it follows that consent must be withdrawn if the government fails to defend the rights of the governed So the right of revolution is reasserted It remains then merely to demonstrate in a catalog of grievances that George III and his government have left basic rights unprotected and have even taken positive action to encroach on them And the argumentative circle is complete the moral warrant for the revolution is indisputably plain

This then was the Declaration of Independence this was the Spirit of 6 At first glance it might seem that it was

1 See 30 p xi.

for governing American external affairs but it was impossible to avoid the hard fact that external policy still had to be con sidered. Accord n ly Congress began almost immediately after the Declaration to formulate a plan for conduct of the joint affairs of the colonies. In July 1/ 7 the Articles of Confedera tion were submitted to the states and w thin ts o years all the states except Maryland had ratified. Maryland v ithheld her approval until March 1 81 not because of distaste for the gen eral provisions of the Articles but because her citizens felt that certain western lands claimed by Virginia Pennsylvania Massachusetts New York and Connecticut should be ceded to the nat on

The form of government established by the Articles of Con federation v as not very different from the informal arrange ment that had developed during the Revolution Congress was composed of delegates chosen by each state in whatever manner it m ght choose and each state delegation was entitled to one vote Although such instit tions as a separate execu tive authority and a bicameral legislature were commonplace in the state governments of the day neither of these charac teristic principle of later American const tutional theory v as embodied in the Articles Congress was a single unit and the President prov ded for in Article IX v as merely its pre siding officer Executive power was v elded by various com mittees at first appo nted on an indiscriminate *ad hoc* basis but in 1/81 to some extent integrated by the establ shment of permanent departments of Foreign Affairs Treasury War and Marine Congress was endov ed with the pov er to make war and peace to conduct foreign affairs to regulate the Indian tribes to co n money and to establish a post office A l mited jud cial function is reflected in the authority of Congress to establ sh tr bunals to deal v ith interstate disputes and with certa n issues of marine law

The nature of these arrangements suggests that America looked upon the go ernment under the Art cles as a sort of d plomatic assembly presiding over a league of others ise inde pendent states and this description s confirmed by other pro-

for governing American external affairs but it was impossible to avoid the hard fact that external policy still had to be considered. Accordingly Congress began almost immediately after the Declaration to formulate a plan for conduct of the joint affairs of the colonies. In July 1777 the Articles of Confederation were submitted to the states and within two years all the states except Maryland had ratified. Maryland withheld her approval until March 1781 not because of distaste for the general provisions of the Articles but because her citizens felt that certain western lands claimed by Virginia, Pennsylvania, Massachusetts, New York and Connecticut should be ceded to the nation.

The form of government established by the Articles of Confederation was not very different from the informal arrangement that had developed during the Revolution. Congress was composed of delegates chosen by each state in whatever manner it might choose and each state delegation was entitled to one vote. Although such institutions as a separate executive authority and a bicameral legislature were commonplace in the state governments of the day, neither of these characteristic principles of later American constitutional theory was embodied in the Articles. Congress was a single unit and the "President" provided for in Article IX was merely its presiding officer. Executive power was wielded by various committees at first appointed on an indiscriminate *ad hoc* basis but in 1781 to some extent integrated by the establishment of permanent departments of Foreign Affairs, Treasury, War and Marine. Congress was endowed with the power to make war and peace, to conduct foreign affairs, to regulate the Indian tribes, to coin money, and to establish a post office. A limited judicial function is reflected in the authority of Congress to establish tribunals to deal with interstate disputes and with certain issues of marine law.

The nature of these arrangements suggests that America looked upon the government under the Articles as a sort of diplomatic assembly presiding over a league of otherwise independent states, and this description is confirmed by other pro-

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The states for example retained the power to make their own commercial regulations and the nat o
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for carrying on its operations j taxes in order to obtain funds dependent upon requisitions against the states the national government was

But important as were these omissions from the catalog of federal powers under the Art cles of Confederation the fatal weakness of the national government was a more general one —that it had no sanctions to enforce the powers that were granted to it or to compel the states to conform to a n pattern This deficiency i ll
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us in fact they hono ed the national govern e of surveyed land ment s requ sitions when they chose to and breached them when they preferred Nothing could be done to make the states comply if they were reluctant to do so actual coercion of the states by the nat onal government was untl inkable even if it had been possible for the average American thou ht of himself as a V rgin an or a New Y rker f rst and as an Ameri can second And the central government was equally ill armed to enforce confederation laws against citizens ma nly because the Art cles h d failed to provide for a federal judiciary Ad herence to confede ation laws was supposed to be enforced by the courts of the states but these tribunals were subject to no over r ding appellate autl ority This meant that they could follow national laws or ignore them depending on their own prefe ences

Tl ese faults in the system of government establ hed by the Articles f Confederat on were reflected in the h story of the per od The debt contracted during the Revolut on remained unpaid and this was felt by the many bou geois-minded among the colonist to constitute a cont nuing reproach to na t onal honor Great B ta n discrim nated against American merchant ship and tl e government of the United States was

and Gerry were won over to the Anti Federalist party of Jefferson But for the time being they were commonly devoted to the cause of national union The Federalists sought a revolution that would break the bonds with the mother country to that end they had embraced the principle of republicanism as their moral justification But the revolution they had envisioned was intended to preserve as well as innovate it was meant to enshrine not only the will of the people but also the sober virtues of the Anglo-American middle class tradition And now it seemed they were faced with a peril which as Americans they deeply dreaded—the peril that one principle might become predominant that the nation might be forced to choose between the tradition and the people They faced or thought they faced a danger which would be known throughout the world a few years later as Jacobinism

Fortunately for the future of American union the faction in the colonies which was most stirred by these fears consisted of those who by heredity and training were the natural leaders of the new nation Whether or not the nascent democratic movement contained the seeds of Jacobinism it certainly did constitute a powerful disunionist force and the conservative leaders of opinion who had helped make the Revolution now set themselves the task of preventing it from realizing these twin potentials The democratic spirit whose excesses they dreaded was in fact only half formulated and ill-supplied with men to plead its cause and the result was that the traditional leaders of the community were able to carry through a successful program for establishing union and mitigating the dangers of unchecked popular rule

Yet it would be a serious mistake (though it is one frequently made) to interpret the movement for union and the eventual establishment of the National Constitution as a counter revolution in the profound sense as a Thermidorean reaction So to regard this development is to misunderstand both the nature of the American community of the 1780s and the character of its leaders The democratic drive that found expression in stay laws and tender acts was disturbing to

derstanding the work of the Convention The most important compromise from the viewpoint of those who attended the Convention was the agreement as to the method for choosing the House of Representatives and the Senate the two legis lative bodies of the proposed government. The delegation from Virgin a had come to the Convention armed with a plan which had probably been drafted by James Madison [1] This plan was startlingly radical it ignored the assumption that the delegates were assembled to consider revisions to the Ar ticles of Confederation and boldly set forth an entirely new structure of government that suggested government was frankly nationalist c sharply in contrast to the loose confed eration of the past. No doubt the Virginia proposal was a part of the program of the advocates of unionism a calcu lated attempt to d slodge the principle of states rights at the outset and to some extent it accomplished its purpose Those who might have hes tated to depart from th decentralization of the Articles were comforted when they did so by the re flect on that the Virginia Plan would have gone much farther But the V rgin a proposal also ra sed one of the bitterest is sues of the c nvent on s nce it provided that both Houses of Congress be chosen on the basis of population This would mean that a fev large states among them of course Virginia itself would enjoy a commanding voice in the new govern ment and the smaller states objected strenuously They coun t red with the New Jersey Plan [2] a much more modest pro- posal for revis ng the Articles which would have preserved the autonomy of the states as the basic principle of the new system and fo a time the Convention deadlocked on this issue The final compromise—the Great Compromise —was to g ve the states equal rep esentation in the Senate while re taining the principle of representation by population in the

Alth gh th pl as fficially bm ted to th Conventi by R d lph Cf. both "Th Virg nia Pla as Offered b R ndolph nd "Th V rgi Pl Reported by th Comm tee f the Wh l e pri ed pp ff

Cf pp 30ff

Congress would not use the commerce power to interfere with the importation of slaves until 1808 (Article I Section 9) and the agreement for choosing the President by electoral vote in the first instance and by individual vote of the states if no candidate receives a majority (Article II Section 1) Since the first of these became of historical interest only in 1808 and since as far as the second is concerned the rise of political parties made it almost academic, neither of these compromises can be regarded as involving issues of very great moment The conclusion seems inescapable that the controversies of the Convention were comparatively trivial in their main concerns

When we turn to consider the matters over which controversy did *not* rage the explanation of this fact becomes apparent. When we enumerate the issues on which there was no need to compromise because there was little or no substantial disagreement the real nature of the constitutional movement becomes plain The startling fact is that the Convention was in almost solid agreement on the basic presumptions of political science which were to form the cornerstones of the new constitutional structure and their concord on these presumptions was far more significant than their disagreements on the matters that led to the compromises To begin with the delegates assumed from the first that the form of the government would be republican by which they meant that it would find its great source of power in the people Some of the delegates as has been suggested wished to see democracy controlled some were inordinately fearful of majority tyranny and distrustful of popular judgments This was certainly the attitude of Hamilton and Gouverneur Morris two of the ablest and most vocal delegates and it was shared in varying degrees by such members as William Randolph of Virginia and Elbridge Gerry of Massachusetts All of the states at this time imposed some restrictions on the right of suffrage and most of them required a property qualification for voting There is no doubt that many of the Convention's delegates would have been pleased to see such restrictions embodied in the Federal Constitution and were deterred mainly

House This meant that the smaller states would retain the power to defend themselves against a possible coalition of their more populous neighbors and the compromise is of course historically important because it saved the Convention but its importance to this analysis is chiefly in that it illustrates the comparative triviality of the issues on which the delegates divided As history was to demonstrate there was no realistic ground for believing that the large states would make common cause against the small the great controversies in American politics have [illegible] sectional and economic rivalries which have grouped both small and large states together on opposing sides The [illegible] of equal representation in the Senate [illegible] later to assume great importance since it enabled the South to protect its interests against the more populous north but the idea that the large states as such would conspire to oppress the small [illegible] foundation [illegible] Convention's [illegible]

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Something [illegible] the question of major compromise [illegible] for representation [illegible] how slaves should be [illegible] already sentation in the House of Representatives [illegible] for purposes of taxation [illegible] large [illegible] property for poses of representation [illegible] were not purpose of taxation [illegible] The Convention enthusiastic [illegible] three fifths tion resolved the [illegible] decided that clause of Article I [illegible] each slave should [illegible] for purposes of representation [illegible] years slavery became such a [illegible] importance promise appeared [illegible] be said was not widely recognized [illegible] mon to reflect a vital conflict in contemporary [illegible] ized in

Two other compromises are traditionally emphasized [illegible] the agreement th[illegible] issing the work of the Convention—

ically inclined had found confirmation for their bias in favor of separation of powers in the writings of Montesquieu and in those of their own John Adams and Thomas Jefferson I y 1787 the principle was an axiom beyond ser ous dispute in America and it would have been qi ite unthinkable to present a frame of government which did not divide the executive from the legi lative and both from the judicial pov ers

Nor was there need to compromise on the question as to whether the new Constitution was to be the supreme law of the land As has been suggested above the most serious defect of the Art cles of Confederation had been their failure to prov de the central government with a means for enforcing its commands The result was that the national government v as in practice inferior to the member states even as to the purposes of the union Now the Convention with very little argument took the all important steps of asserting the supremacy of the nat onal government and its laws (Article VI Section) and of provid ng a means—the Federal judiciary —by which that supremacy could be implemented by enforcing the national commands against individuals It is impossible to ex gge ate the signif cance of this dual innovation The s premacy clause has been called the linchp n of the Const tut on, and it is indeed hard to imagine that a national government could have been established without it The au thor ty to act d ectly on ind v duals in collect ng taxes and enforcing laws was a new departure n the practice of federal m. Yet ne ther of these advances gave rise to serious controversy w th n the Con ention hall

The basic agreement among the delegates was even more strikin when they turned to cons der those sections of the Constitut on th t had most directly to do with property r ghts and commercial relations As has already been suggested there was at the time a fairly clear-cut split between the interests of land hold ng debtors on the one hand and merchant cred tors on the other the former group had been inclined to ad ocate oft money and a relaxation of creditors rights Put no such divis on of opinion was apparent among the mem

struggle a sober serious property-conscious well informed even scholarly minority These men knew what they wanted when they essayed the task of constitution making just as they had known what they wanted when they donned the garb of revolutionaries. They had wanted (remarkable conception!) a moderate revolution whose moral justification would be found both in the will of the people and in the constitutional tradition a revolution which would disturb the status quo only so much as they felt it ought to be disturbed Reckless of strict logic pragmatic to the core they had incorporated in their revolutionary ideology the most disparate principles secure in the confidence that they could make th[illegible] of half a-dozen different worlds [illegible]

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[illegible] checks and balances [illegible] tion they had created was ment of majority rule Yet the very instrument that drew its power from the people laid down restrictions on the popular will a result which might sound to a logician very much like nonsense So likewise with the power granted to the central government—on the one hand it was desired to strengthen it substantially on the other hand too strong a government was traditionally dreaded in America The solution was characteristic the government was revitalized by granting it broad powers and at the same time weakened by institutionalizing rivalry between its main branches The separation of powers principle was carefully calculated to prevent a majority from seizing power and using it without restriction The enumeration of national powers meant that the government even in the hands of a majority was denied the right to exercise powers *not* enumerated Sections nine and ten of Article I were crowded with prohibitions against the national government and the states respectively And although a formal Bill of Rights was not appended to the original document the addition of this safeguard against unchecked power (whether in the hands of the majority or not) was approved by most of those who had participated in the Convention. Finally the

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most serious question of all at the moment—whether the United States was to be a true nation or a league of sovereign states—was not confronted at all but was set aside for the disposal of history.

The Constitution itself was consistent with either interpretation, as interminable constitutional debates of the future were to show. The nation-confederation problem had been dealt with like all major political questions in America, by embracing both alternatives and trusting to providence that the incompatibility could be permanently ignored. And the men who had fashioned this instrument of government knew that whether the majority of the people seemed at the moment to like the Constitution or not, it would work for them because it so faithfully reflected the American political character.

4. *The Ratification*

The events that followed the presentation of the finished document to the states demonstrate the validity of the propositions that have permeated this discussion so far. To begin with, in the ratification struggle it became apparent that the people as a whole did not share the Convention's nearly unanimous enthusiasm for a new instrument of government; indeed it is fairly clear that a majority of the populace was opposed to ratification. On the other hand, and in the second place, it is equally evident that the people were not opposed to the basic premises of the Constitution's political faith—republicanism, constitutionalism, separation of powers—but were animated chiefly by a somewhat ill-informed suspicion that the new government would encroach on popular liberties. Thirdly, the ratification struggle and its successful conclusion demonstrated that the "Federalists" (those who had spearheaded the movement for a new constitution) still enjoyed a superiority of leadership which enabled them to impose their will on the nation even though the majority disapproved. And finally, the rapid development during the post-ratification period of

almost uni ersal veneration for the nes organic law suggested that the instrument created in 1787 was however lacking in logical symmetry an appropriate frame of government for a nat on more concerned with results than with logic.

The struggle over ratification was intense and even bitter but the most striking thing about it is the comparative im potence of those who opposed the new Constitution That they were in a majority in most of the states seems plain enough but their preponderance was purely numerical. Both argumentat ely and strategically their opponents enjoyed a clear advantage By far the most powerful anti federalistic argument was based on the curious fact that the Convention had failed to include a Bill of Rights in the proposed consti tut on Considering the American preoccupation with the con cept of fundamental rights discussed above and the standard practice of appending Bills of Rights to the state constitutions th s om ssion stands forth as the one great tactical miscalcula t on of the Con ention Apparently the delegates thought that a detailed list of limitat ons on the federal government was unnecessary since the po ers of the government were already restricted by the principle of delegation (this was the concept, mpl cit in the Constitution and ultimately made explicit in the Tenth Amendment that the national government could exercise only the powers enumerated in the Constitution wh le all other po ers were reserved to the states) But this argument—wrong n any case as the history of the necessary and proper clau e Article I Sect on 8 Paragraph 18 was t show—was too subtle for most voters and the anti federalists were able to argue that the omiss on betrayed an intention to sub ert the l berties of the people Much of the wind was drawn f om the sa ls of this argument however when it was agreed that a B ll of Ri hts along traditional American lines would be added by the first sess on of Congress under the new government and in some key states this was made in effect a cond tion f rat fication

Apart from this issue the polemical weapons in the anti federalist arsenal were relatively few and ineffective as com

the Federalists outmaneuvered their opponents time after time The ratification of the Constitution like its composition was a tribute to the leadership qualities of the class that had piloted America throughout these first stormy years of her national history

Ratification having been achieved by the narrowest of margins and against the preferences of what seems to have been a majority in the nation its aftermath is all the more remarkable Not all the wounds opened by the ratification struggle were easily healed and this was especially true of the central issue the problem of states rights The idea of decentralization had been espoused by a faction calling themselves Anti Federalists and it chanced that this group was also in general composed of men who were more sympathetic to popular government than were many of the Federalists States rights thus became identified in the popular mind with the democratic spirit and the alliance created vast difficulties in the years to come since the cause of state sovereignty was able to draw support from the cause of democracy The Anti Federalists hard up for leaders in the ratification controversy soon found them in men like Thomas Jefferson James Madison George Clinton of New York and Albert Gallatin of Pennsylvania. As the group around Hamilton demonstrated their predilection in favor of the mercantile interests of the Eastern seaboard this Jeffersonian faction claimed the allegiance of the landed interests of the South and West so that states rights populism and agrarianism were forged into a powerful alliance This triple entente was not only the basis for Jefferson s party (now renamed Republican) It was also the basis of an alignment in American political doctrine that persisted with more or less vitality until the Civil War and in fact still revives from time to time in the modern era Thus the ratification controversy can be said to have set the patterns of American political factionalism for many years to come But the Constitution itself the supposed object of contention was warmly embraced. In a few years almost in months the vestiges of opposition to the new Constitution

pared with those the Federalists were able to bring to bear. One of the most striking things about the *Federalist* papers written by Hamilton, Madison and Jay [illegible] the ratification struggle in New York is the unan[illegible] [illegible] of their arguments in terms of American politi[illegible] [illegible]. A Turgot or a Paine might [illegible] at the [illegible] of the separation of power in the new Constitution but few Americans on either side of the ratification arguments were disposed to question it. [illegible] proposed the concept [illegible] populist ideal [illegible] governmental [illegible] and the moderate [illegible] but American [illegible] had a reason [illegible] Madison [illegible] willing to forego [illegible] continued [illegible] were [illegible] achieve [illegible] the state inclined to [illegible] ratification the advant[illegible] the anti convention [illegible] to ran the [illegible] forced to fe[illegible] charge the ne[illegible] establish rest their [illegible] pow that the [illegible] was central [illegible] erful [illegible] not calcul[illegible] the law

Moreo[illegible] is their superi[illegible] trail when [illegible] In Mas accompli[illegible] of bitterne[illegible] sachusett[illegible] ming of the [illegible] ratification [illegible] of [illegible] hampton were on the ot[illegible] ratification were repr[illegible]ented [illegible]

assumpt on that it is possible to ride both horns of most di lemmas In a v orld of deep and irresolvable conflicts legalism can have only a limited place since the questions that divide society transcend the issue of legality But in a nation which is convinced that nconsistency is tolerable legalism becomes king The *ad hoc* contingent process of judicial exclusion and inclusion is appropriate to cope with a society which has refused to decide that a single pr nciple of pol tics shall be its central guide and has preferred to embrace several principles indiscriminately

III THE DOCUMENTS AS EXPRESSIONS OF POLITICAL IDEAS

The American Commonwealth has come a long way since the days when the th teen former Colon es gave themselves the Const tution after adopt ng the Declarat on of Independence In wr t ng its provisions the framers were not at all sure how lon it would last At the end of *The Federalist* David Hume s cited as authority for the r sks involved in constitution making

To balance a large state or society on general laws (meaning a constitution) is a work of so great difficulty that no human genius how ever comprehensive is able by the mere dint of reason and reflection t effect t The judgments of many must unite in the work experience must guide their labor time must bring it to perfection and the feeling of inconveniences must c rrect the mistakes which they *inevitably* fall into in their first trials and experiments [1]

If anyone had shown them a vision of the United States in the twentieth century they would have been surprised and

[1] Hal es H m lt ed Th F de a t No. 85 (New Y k Putnam 1888) p 5 1

itable and there have been times when it seemed that th contrast in their aims made them basically incompatible

So it appeared for example to the old line proponents of states rights in the early years of the nineteenth century when the Supreme Court under the Chief Justiceship of the great John Marshall bent itself to the task of welding the young republic into a true nation Marshall asserted and maintained the supremacy of the national court over the courts of the states when federal questions were involved he upheld such national legislation as the act incorporating the Bank of the United States in spite of the charge that Congress had here exceeded its constitutional powers and he struck down state laws which threatened to fragmentize the national structure To advocates of states rights like John Randolph of Roanoke and John Taylor of Caroline these *di ta* represented a darkly ominous threat to liberty and Randolph was moved to say

> if with the most approved spring lancets you draw the last drop of blood from our veins if *seci n lum artem* you draw the last shilling from our pockets what are the checks of the Constitution to us? A fig for the Constitution When the scorpions sting is probing us to the quick shall we stop to chop logic? 1

Nevertheless the views of the Chief Justice prevailed the cause of national union was greatly fortified by Marshall s forthright pronouncements And as time wore on more and more Americans began to feel that the choice Randolph and Taylor had propounded between liberty and union was a false one and that the proper course for the United States was that suggested by a famous peroration of Daniel Webster Liberty *and* Union now and forever one and inseparable! 2 In short, it was felt at least in the North that the old equation of freedom with state autonomy was a false one and that

1 Henry Adams *J h R d lph* ed J b T M rse J (Boston H hton Mifflin & Co 1896) p ??9

2 *S l t d Sp eches f Dan l W b ter* P f ce d I trod u n by A. J George (Boston D C. Heath & Co 1911) p ?31

ers Out of this welter of idealism and casuistry only one fact really emerged clearly that the American Constitution was face to face with its severest test. For once the traditional American faith that conflicts would resolve themselves within the structure of constitutionalism was proved groundless, and it took the bitter and bloody Civil War to establish beyond further argument that chattel slavery would go and the union would survive

The Northern victory made it clear as the Constitution had not, that the American nation was in the phrase of Chief Justice Chase an indestructible union of indestructible states But the triumph of the North was also the triumph of industrialism and the problem of conflict between the Declaration and the Constitution soon presented itself in a new guise. In the hands of a business minded Supreme Court, the Constitution was converted in the later years of the nineteenth century into a charter of economic rights for corporate enterprise and with the help of the due process clause of the Fourteenth and Fifth Amendments and the commerce clause of Article I the federal judges frustrated reformist efforts to clear the way for pursuit of happiness which the Declaration had promised Meanwhile the protection of Negro rights which the North had attempted to insure through the passage of the Thirteenth Fourteenth and Fifteenth Amendments was minimized by judicial decision

But in the 1930s the course of constitutional interpretation underwent still another change The Fourteenth Amendment ceased being used by the Court to stifle economic experimentation and became instead a guarantee of individual freedoms such as speech press, and a fair trial against action by the state and the commerce clause became as it had been for Marshall a grant of power to the national government rather than a limitation With these developments it might be said that the Declaration and the Constitution moved closer together than they had even been before The inevitable gap between ideal and working system still existed to underline the fact that the source of a model political order is to be

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in the field of federalism, of jud cial review and other items, especially in the field of human rights Finally and still more recently the drafters of a constitution for a European Community have utilized extensively the experience of the United States as a measuring rod by which to test their own plans and proposals

The demonstrative and educational value of the Declaration of Independence and of the Constitution results however f om an indirect influence upon constitutional developments which were local and autonomous But there is a wider arena in which the constitutional tradition of the United States has achieved world significance When President Wilson set forth the plan for a League of Nations—a plan which was nurtured by a group of pr vate organizations deeply imbued with this trad tion—he actually projected onto the world plane the thinking which had been embodied in America s constitutional documents The fact that the League failed has dimmed the vis on wh ch animated its builders Characteristically its constitution was called a covenant It was in the tradition of republicanism and constitutionalism as cherished at the time of the Amer can revolution This is not the place to explore the reasons for its failure The establishment of the United Nations proved this failure to be a temporary one anyhow For the Un ted Nat ons i another and perhaps a more vigorous sprout from the same root. It too is in l ne with the basic co e of onstituti nal sm Its Declarat on of Universal Human Right wh le at p esent neither enforced nor enforceable clearly demonstrates the forward march of the inherent ideas Nor sh uld we be unduly concerned about the temporary unenforceab l ty have previous bills of right been fully or even app ox mately enf ced The United States has been at work for over a cent ry and a half trying to make its bill of rights work great strides have been made but the ideal is far from be ng a reality

Preci ely because there culminate in these great American doci ments trends which the accumulated dross of European gove nment and privileged status would not allow to come to

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THE DECLARATION OF INDEPENDENCE

[July 4 1776]

The unanimous Declaration of the thirteen united States of America

WHEN IN THE COURSE OF HUMAN EVENTS it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the Powers of the earth the separate and equal station to which the Laws of Nature and of Nature s God entitle them a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation

We hold these truths to be self-evident that all men are created equal that they are endowed by their Creator with certain unalienable Rights that among these are Life Liberty and the pursuit of Happiness That to secure these rights Governments are instituted among Men deriving their just powers from the consent of the governed That whenever any Form of Government becomes destructive of these ends it is the Right of the People to alter or to abolish it and to institute new Government laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their Safety and Happiness Prudence indeed will dictate that Governments long established should not be changed for light and transient causes and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed But when a long train of abuses and usurpations pursuing invariably the same Object evinces a design to reduce them under absolute Despotism it is their right, it is their duty to throw off such Government and to provide new Guards for their future security —Such has been the patient sufferance of these Colonies

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tenure of their offices and the amount and payment of their salaries

He has erected a multitude of New Offices and sent hither swarms of Officers to harass our People and eat out their substance

He has kept among us in times of peace Standing Armies without the Consent of our legislature

He has affected to render the Military independent of and superior to the Civil Power

He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws giving his Assent to their acts of pretended legislation

For quartering large bodies of armed troops among us

For protecting them by a mock Trial from Punishment for any Murders which they should commit on the Inhabitants of these States

For cutting off our Trade with all parts of the world

For imposing taxes on us without our Consent

For depriving us in many cases of the benefits of Trial by Jury

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province establishing therein an Arbitrary government and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies

For taking away our Charters abolishing our most valuable Laws and altering fundamentally the Forms of our Governments

For suspending our own Legislature and declaring themselves invested with Power to legislate for us in all cases whatsoever

He has abdicated Government here by declaring us out of his Protection and waging War against us

He has plundered our seas ravaged our Coasts burnt our towns and destroyed the lives of our people.

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dependent States that they are Absolved from all Allegiance to the British Crown and that all political connection between them and the State of Great Britain is and ought to be totally dissolved and that as Free and Independent States they have full Power to levy War conclude Peace contract Alliances establish Commerce and to do all other Acts and Things which Independent States may of right do And for the support of this Declaration with a firm reliance on the Protection of Divine Providence we mutually pledge to each other our Lives our Fortunes and our sacred Honor

JOHN HANCOCK.

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WM WHIPPLE
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Massachusetts Bay

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ARTICLES OF CONFEDERATION

[November 15 1777]

To all to whom these Presents shall come we the undersigned Delegates of the States affixed to our Names send greeting

WHEREAS THE DELEGATES of the United States of America in Congress assembled did on the fifteenth day of November in the year of our Lord One Thousand Seven Hundred and Seventy-seven and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire Massachusetts bay Rhodeisland and Providence Plantations Connecticut New York New Jersey Pennsylvania Delaware Virginia North-Carolina South-Carolina and Georgia in the Words following viz

ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES OF NEWHAMPSHIRE MASSACHUSETTS-BAY RHODEISLAND AND PROVIDENCE PLANTATIONS CONNECTICUT NEW YORK NEW JERSEY PENNSYLVANIA DELAWARE MARYLAND VIRGINIA NORTH CAROLINA SOUTH CAROLINA AND GEORGIA

ARTICLE I The stile of this confederacy shall be "The United States of America.

ARTICLE II Each State retains its sovereignty freedom and independence and every power jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled.

ARTICLE III The said States hereby severally enter into a firm league of friendship with each other for their common defence the security of their liberties and their mutual and general welfare binding themselves to assist each other against all force offered to or attacks made upon them or

Pennsylvania

ROBT MORRIS
BENJAMIN RUSH
BENJA FRANKLIN
JOHN MORTON
GEO CLYMER
JAS SMITH
GEO TAYLOR
JAMES WILSON
GEO ROSS

Delaware

CÆSAR RODNEY
GEO READ
THO M KEAN

Maryland

SAMUEL CHASE
WM PACA
THOS STONE
CHARLES CARROLL of Carrollton

Virginia

GEORGE WYTHE
RICHARD HENRY LEE
TH JEFFERSON
BENJA HARRISON
THOS NELSON jr
FRANCIS LIGHTFOOT LEE
CARTER BRAXTON

North Carolina

WM HOOPER
JOSEPH HEWES
JOHN PENN

South Carolina

EDWARD RUTLEDGE
THOS HEYWARD junr
THOMAS LYNCH junr
ARTHUR MIDDLETON

Georgia

BUTTON GWINNETT
LYMAN HALL
GEO WALTON

capable of being a delegate for more than three years in any term of six years nor shall any person being a delegate be capable of holding any office under the United States for which he or another for his benefit receives any salary fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States and while they act as members of the committee of the States

In determining questions in the United States in Congress assembled each State shall have one vote

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress and the members of Congress shall be protected in their persons from arrests and imprisonments during the time of their going to and from and attendance on Congress except for treason felony or breach of the peace

ARTICLE VI No State without the consent of the United States in Congress assembled shall send any embassy to or receive any embassy from or enter into any conference agreement alliance or treaty with any king prince or state nor shall any person holding any office of profit or trust under the United States or any of them accept of any present emolument office or title of any kind whatever from any king prince or foreign state nor shall the United States in Congress assembled or any of them grant any title of nobility

No two or more States shall enter into any treaty confederation or alliance whatever between them without the consent of the United States in Congress assembled specifying accurately the purposes for which the same is to be entered into and how long it shall continue

No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled with any king prince or state in pursuance of any treaties already proposed by Congress to the courts of France and Spain

No vessels of war shall be kept up in time of peace by any

capable of being a delegate for more than three years in any term of six years nor shall any person being a delegate be capable of holding any office under the United States for which he or another for his benefit receives any salary fees or emolument of any kind

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In determining questions in the United States in Congress assembled each State shall have one vote

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ARTICLE VI No State without the consent of the United States in Congress assembled shall send any embassy to or receive any embassy from or enter into any conference agreement alliance or treaty with any king prince or state nor shall any person holding any office of profit or trust under the United States or any of them accept of any present emolument office or title of any kind whatever from any king prince or foreign state nor shall the United States in Congress assembled or any of them grant any title of nobility

No two or more States shall enter into any treaty confederation or alliance whatever between them without the consent of the United States in Congress assembled specifying accurately the purposes for which the same is to be entered into and how long it shall continue

No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled with any king prince or state in pursuance of any treaties already proposed by Congress to the courts of France and Spain

No vessels of war shall be kept up in time of peace by any

any of them on account of religion sovereignty trade or any other pretence whatever

ARTICLE IV The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union the free inhabitants of each of these States paupers vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States and the people of each State shall have free ingress and regress to and from any other State and shall enjoy therein all the privileges of trade and commerce subject to the same duties impositions and restrictions as the inhabitants thereof respectively provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant provided also that no imposition duties or restriction shall be laid by any State on the property of the United States or either of them

If any Person guilty of or charged with treason felony or other high misdemeanor in any State shall flee from justice and be found in any of the United States he shall upon demand of the Governor or Executive power of the State from which he fled be delivered up and removed to the State having jurisdiction of his offence

Full faith and credit shall be given in each of these States to the records acts and judicial proceedings of the courts and magistrates of every other State

ARTICLE V For the more convenient management of the general interest of the United States delegates shall be annually appointed in such manner as the legislature of each State shall direct to meet in Congress on the first Monday in November in every year with a power reserved to each State to recall its delegates or any of them at any time within the year and to send others in their stead for the remainder of the year

No State shall be represented in Congress by less than two nor by more than seven members and no person shall be

that shall be incurred for the common defence or general welfare and allowed by the United States in Congress assembled shall be defrayed out of a common treasury which shall be supplied by the several States in proportion to the value of all land within each State granted to or surveyed for any person as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled

ARTICLE IX The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases what captures on land or water shall be legal and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures provided that no member of Congress shall be appointed a judge of any of the said courts

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary jurisdiction or any other cause what

State except such number only as shall be deemed necessary by the United States in Congress assembled for the defence of such State or its trade nor shall any body of forces be kept up by any State in time of peace except such number only as in the judgment of the United State in Congress assembled shall be deemed requisite to garrison the forts necessary for the defence of such State but every State shall always keep up a well regulated and disciplined militia sufficiently armed and accoutred and shall provide and constantly have ready for use in public stores a due number of field pieces and tents and a proper quantity of arms ammunition and camp equipage

No State shall engage in any war without the consent of the United States in Congress assembled unless such State be actually invaded by enemies or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted nor shall any State grant commissions to any ships or vessels of war nor letters of marque or reprisal except it be after a declaration of war by the United States in Congress assembled and then only against the kingdom or state and the subjects thereof against which war has been so declared and under such regulations as shall be established by the United States in Congress assembled unless such State be infested by pirates in which case vessels of war may be fitted out for that occasion and kept so long as the danger shall continue or until the United States in Congress assembled shall determine otherwise

ARTICLE VII When land forces are raised by any State for the common defence all officers of or under the rank of colonel shall be appointed by the Legislature of each State respectively by whom such forces shall be raised or in such manner as such State shall direct and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII All charges of war and all other expenses

that shall be incurred for the common defence or general welfare and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury which shall be supplied by the several States in proportion to the value of all land within each State granted to or surveyed for any person as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct and appoint.

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judges of the supreme or superior court of the State where the cause shall be tried "well and truly to hear and determine the matter in question according to the best of his judgment without favour affection or hope of reward" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States whose jurisdiction as they may respect such lands and the States which passed such grants are adjusted the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction shall on the petition of either party to the Congress of the United States be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority or by that of the respective States--fixing the standard of weights and measures throughout the United States--regulating the trade and managing all affairs with the Indians not members of any of the States provided that the legislative right of any State within its own limits be not infringed or violated--establishing and regulating post-offices from one State to another throughout all the United States and exacting such postage on the papers passing thro the same as may be requisite to defray the expenses of the said office--appointing all officers of the land forces in the service of the United States except ing regimental officers--appointing all the officers of the naval forces and commissioning all officers whatever in the service of the United States--making rules for the government and regulation of the said land and naval forces and directing their operations

The United States in Congress assembled shall have authority to appoint a committee to sit in the recess of Congress to be denominated "a Committee of the States" and to consist

time of peace nor enter into any treaties or alliances nor coin money nor regulate the value thereof nor ascertain the sums and expenses necessary for the defence and welfare of the United States or any of them nor emit bills nor borrow money on the credit of the United States, nor appropriate money nor agree upon the number of vessels of war to be built or purchased or the number of land or sea forces to be raised nor appoint a commander in chief of the army or navy unless nine States assent to the same nor shall a question on any other point except for adjourning from day to day be determined unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year and to any place within the United States so that no period of adjournment be for a longer duration than the space of six months and shall publish the journal of their proceedings monthly except such parts thereof relating to treaties alliances or military operations as in their judgment require secrecy and the yeas and nays of the delegates of each State on any question shall be entered on the journal when it is desired by any delegate and the delegates of a State or any of them at his or their request shall be furnished with a transcript of the said journal except such parts as are above excepted to lay before the Legislatures of the several States

ARTICLE X The committee of the States or any nine of them shall be authorized to execute in the recess of Congress such of the powers of Congress as the United States in Congress assembled by the consent of nine States shall from time to time think expedient to vest them with provided that no power be delegated to the said committee for the exercise of which by the articles of confederation the voice of nine States in the Congress of the United States assembled is requisite

ARTICLE XI Canada acceding to this confederation and joining in the measures of the United States shall be ad

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In witness whereof we have hereunto set our hands in Congress Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight and in the third year of the independence of America.

On the part & behalf of the State of New Hampshire

JOSIAH BARTLETT
JOHN WENTWORTH Junr
August 8th 1778

On the part and behalf of the State of Massachusetts Bay

JOHN HANCOCK
SAMUEL ADAMS
ELBRIDGE GERRY
FRANCIS DANA
JAMES LOVELL
SAMUEL HOLTEN

On the part and behalf of the State of Rhode Island and Providence Plantations

WILLIAM ELLERY
HENRY MARCHANT
JOHN COLLINS

On the part and behalf of the State of Connecticut

ROGER SHERMAN
SAMUEL HUNTINGTON
OLIVER WOLCOTT
TITUS HOSMER
ANDREW ADAMS

On the part and behalf of the State of New York

JAS DUANE
FRA. LEWIS
GOUV MORRIS
WM DUER

On the part and in behalf of the State of New Jersey
Novr 6 1778

JNO WITHERSPOON
NATHL SCUDDER

On the part and behalf of the State of Pennsylvania

ROBT MORRIS
DANIEL ROBERDEAU
JNO BAYARD SMITH
WILLIAM CLINGAN
JOSEPH REED 22d July 1778

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JOSEPH REED 22d July 1778

THE BASIC DOCUMENTS

II

THE CONSTITUTION IN THE MAKING

RESOLUTION OF CONGRESS

[February 21 1787]

WHEREAS THERE IS PROVISION in the Articles of Confederation & perpetual Union for making alterations therein by the Assent of a Congress of the United States and of the legislatures of the several States And whereas experience hath evinced that there are defects in the present Confederation as a means to remedy which several of the States and particularly the State of New York by express instruction to their delegates in Congress have suggested a convention for the purposes expressed in the following resolution and such Convention appearing to be the most probable means of establishing in these states a firm national government

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union

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cularly belonging to the functions of the second branch during the term of service and for the space of after the expiration thereof

6 RESOLVED That each branch ought to possess the right of originating Acts that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual Legislation to negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union and to call forth the force of the Union against any member of the Union failing to fulfil its duty under the articles thereof

7 RESOLVED That a national executive be instituted to be chosen by the National Legislature for the term of years to receive punctually at stated times a fixed compensation for the services rendered in which no increase or diminution shall be made so as to affect the Magistracy existing at the time of increase or diminution and to be ineligible a second time and that besides a general authority to execute the National laws it ought to enjoy the Executive rights vested in Congress by the Confederation

8 RESOLVED That the executive and a convenient number of the National Judiciary ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate and every act of a particular Legislature before a Negative thereon shall be final and that the dissent of the said Council shall amount to a rejection unless the act of the National Legislature be again passed or that of a particular Legislature be again negatived by of the members of each branch.

9 RESOLVED That a national judiciary be established to consist of one or more supreme tribunals and of inferior tribunals to be chosen by the National Legislature to hold their offices during good behaviour and to receive punctually at stated times fixed compensations for their services in which no in

THE VIRGINIA PLAN AS REPORTED BY THE COMMITTEE OF THE WHOLE[1]

[*June 13 1 8/*]

1. RESOLVED That it is the opinion of this Committee that a national government ought to be established consisting of a Supreme Legislative Judiciary and Executive

RESOLVED That the National Legislature ought to consist of Two Branches

3 RESOLVED That the Members of the first branch of the national Legislature ought to be elected by the People of the several States for the term of Three years to receive fixed stipends by which they may be compensated for the devotion of their time to public service to be paid out of the National Treasury to be ineligible to any Office established by a particular State or under the authority of the United States (except those peculiarly belonging to the functions of the first branch) during the term of service and under the national government for the space of one year after its expiration

4 RESOLVED That the Members of the second Branch of the national Legislature ought to be chosen by the individual Legislatures to be of the age of thirty years at least to hold their offices for a term sufficient to ensure their independency namely seven years to receive fixed stipends by which they may be compensated for the devotion of their time to public service to be paid out of the National Treasury to be ineligible to any Office established by a particular State or under the authority of the United States (except those peculiarly belonging to the functions of the second branch) during the term of service and under the national government for the space of one Year after its expiration

5 RESOLVED That each branch ought to possess the right of originating acts

[1] Th t xt f ll F rrand R ds f th F deral C m t I 228 3 as rra ged by Carl V Do en n b Th G t R h sal (1919) used by permiss f th P bl hers, The V ki g P ess.

to hold their offices during good behaviour to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution

1[illegible] RESOLVED That the national Legislature be empowered to appoint inferior Tribunals

13 RESOLVED That the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue impeachments of any National officers and questions which involve the national peace and harmony

14 RESOLVED That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise with the consent of a number of voices in the National legislature less than the whole

15 RESOLVED That provision ought to be made for the continuance of Congress and their authorities until a given day after the reform of the articles of Union shall be adopted and for the completion of all their engagements

16 RESOLVED That a republican Constitution and its existing laws ought to be guaranteed to each State by the United States

1[illegible] RESOLVED That provision ought to be made for the amendment of the articles of Union whensoever it shall seem necessary

18 RESOLVED That the Legislative Executive and Judiciary powers within the several States ought to be bound by oath to support the articles of Union

19 RESOLVED That the amendments which shall be offered to the confederation by the Convention ought at a proper time or times after the approbation of Congress to be submitted to an assembly or assemblies of representatives recommended by the several Legislatures to be submitted to an assembly or assemblies of representatives recommended by the several Legislatures to be expressly chosen by the People to consider and decide thereon

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4 RESOLVED That the United States in Congress be authorized to elect a federal Executive to consist of persons to continue in office for the term of years to receive punctually at stated times a fixed compensation for their services in which no increase or diminution shall be made so as to affect the persons composing the Executive at the time of such increase or diminution to be paid out of the federal treasury to be incapable of holding any other office or appointment during their term of service and for years thereafter to be ineligible a second time and removable by Congress on application by a majority of the Executives of the several States That the executive besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for and to direct all military operations provided that none of the persons composing the federal executive shall on any occasion take command of any troops so as personally to conduct any military enterprise as General or in any other capacity

5 RESOLVED That a federal Judiciary be established to consist of a supreme Tribunal the Judges of which to be appointed by the Executive and to hold their offices during good behaviour to receive punctually at stated times a fixed compensation for their services in which no increase or diminu

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THE BASIC DOCUMENTS

III

THE CONSTITUTION

A BRIEF SUMMARY

Although most of the principal provisions of the Constitution have been touched on in the introductory essay it may be useful at this point to set down a brief systematic analysis of the document to serve the purposes of both summary and clarification

I GENERAL PRINCIPLES OF THE CONSTITUTION

1 The nature of the Union The American nation has been identified in a phrase quoted elsewhere in these pages as an indestructible Union composed of indestructible States 1 and this perpetual character of the constitutional arrangement has been recognized both in law and fact since the Civil War and in theory long before that. The textual warrants for this description are comparatively meager for one it has been argued that the Articles of Confederation were declared to be perpetual and that the Preamble to the Constitution declares that the object is to form a more perfect Union hence the perpetuity of the present Union is inevitably implied For another thing it can be argued that although the Constitution provides a method by which states are admitted to the Union (see Article IV Section 3) it sets up no machinery for secession from it and recognizes no such possibility unless the amending clause be so regarded (Article V) Presumably the power of amendment might ratify a state's choice to leave the Union (although a theoretical dissent even to this might be made) but others use the constitutional text is said to imply an indissoluble arrangement In any case the words of the Constitution aside the Civil War settled the question of indestructibility on a de facto basis and surely nothing except war or the amending power can alter that status As for the amending power itself although it might be regarded as theoretically limited

1 Texas v White 7 Wall 700 (1869)

of state trade regulations are forbidden because they in vad the dormant commerce power of Congress and that the states may not directly tax an instrumentality of the federal government (a prohibition which has also been applied in reverse so as to restrict the national government in taxing the states) Neither of these legal concepts is expressed in any specific clause of the Constitution they are said to arise from the nature of the federal system itself

4 Inte state Relations The provisions in Article IV Sections 1 and 2 relating to this subject are survivals of the interstate comity provisions of the Articles of Confederation Other provisions are the interstate compact clause of Article I Section 10 Paragraph 3 whose possibilities as a source of interstate cooperation are only recently being realized and the arrangement in Articl III Section wh ch gives the federal judiciary jurisdiction over interstate disputes Finally the commerce clause has been held to prevent the states from erecting commercial barriers against their neighbors so as to favor their own citizens at the expense of the rest of the nation

5 Elections The power to prescribe voting qualifications was left in the original Constitution to the several states though with some qualifications and subsequent amendments have extended these qualifications much further Article I Section provides that those who vote for Representative must have the qualifications of those who vote for the most numerous branch of the state legislature and the Seventeenth Amendment prescribes the same qualifications for those who elect Senators The states are also forbidden to deny the suffrage on the grounds of race or color (Amendment Fifteen) and on the ground of sex (Amendment Nineteen) The right to cast a vote for federal officers in accordance with valid state regulations can be p tected by Congressional legislation. As for election to the presidency the states are left free to prescribe qualifications to vote for the Electoral College (subject of course to Amendments Fifteen and Nineteen) and it was originally assumed that the Electors so chosen would make a free choice. But in practice the Electors

in some respects the only recognized legal limitation is the denial in Article V of the power to alter the principle of equal representation in the Senate

2 *The Separation of Powers* The Constitution makes no specific reference to this principle but it has always been assumed that the idea is implied by the opening sentences in Articles I II and III i e All legislative powers herein granted shall be vested in a Congress etc The use of the terms legislative executive and judicial respectively imports a division of governmental power between these three departments The courts have however been lenient in permitting Congress to delegate its legislative power to the executive and the line of distinction between the legislative and executive function is now somewhat blurred Nevertheless an attempt by the President to legislate *without* Congressional authorization or a direct attempt by the Congress to assume an executive power could still be invalidated on the basis of this principle

3 *The Nation and the States* The principal clauses of the Constitution relating to national-state relationships specifically are the supremacy [illegible] Article VI Section 2 and the Tenth Amendment The supremacy clause has been called the linchpin of the Constitution since it has the effect of binding the whole structure of national government together It [illegible] that a legitimately passed [illegible] overruling state law even though [illegible] that the legislation and [illegible] re subject to [illegible] the Supreme Court of the United States (see below) The Tenth Amendment [illegible] the principle of delegated [illegible] national government [illegible] rated in the Constitution [illegible] tions of government are retained by the [illegible] as supposed to be implicit in [illegible] and the Tenth Amendment merely makes it explicit In addition to these provisions judicial [illegible] has inhibited the states in certain ways [illegible] dealings with the Nation For example it has been held that some kinds

existence is inferred from the nature of the legislative function and the power to control the appellate jurisdiction of the Supreme Court (Article III Section 2) The upshot of this impressive array of authority—and the list could be extended substantially—is that the Congress is endowed with the full range of powers generally expected of a sovereign nation and that constitutionally speaking it stands forth as the dominant branch of the federal triumvirate

2 *The Powers of the President* The Constitution makes the President an extremely potent executive Article I Section specifically makes him commander in chief of the nation s armed forces grants him broad control over the foreign policy of the United States through the treaty making power and authority over the administrative agencies of government through the power of appointment and removal. It is true that the Senate participates in both the treaty making and appointment process and that body is by no means negligible But the President in the nature of the case holds the initiative and this means that he is usually the dominant partner with respect to these functions The distinguishing character of the president s constitutional authority is however its vagueness His authority as commander in chief and his duty to take care that the laws be faithfully executed (Article II Section III) are both hard to define and some commentators have made much of them More over it had been argued that the bestowal of the executive power vests him with general authority to perform the acts appropriate to that function quite apart from any explicit constitutional or congressional mandate At all events it is clear that he is a very powerful figure His position relative to the Congress probably depends not so much upon the Constitution as upon the facts of political life at any given time

3 *The Judicial Power* The salient facts about the judicial power are two the authority to review the acts and judicial decisions of the states which is supposedly derived from the supremacy clause and from the implications of Article III and the authority to review acts of

them as reasonably justified by some public danger Amendments Four through Eight protect certain procedural rights of the individual—generally speaking the right to be free from arbitrary treatment by police officers and the right to a fair trial Amendments Thirteen through Fifteen are the so-called Civil War Amendments passed after that conflict largely to ensure the newly freed Negro his civil rights From the point of view of litigation the Fourteenth has been by far the most important For some seventy years after its passage in 1868 the due process clause of that Amendment was interpreted chiefly as a protection for property holders but today it is construed to restrict the states in somewhat the same way that the first eight Amendments limit the national government

the President and the Congress in the light of their constitutionality. The latter power has been tenuously attached to various provisions of the Constitution by judges bent on asserting it, but the fact is that the institution of judicial review over acts of Congress derives from no specific constitutional clause but is inferred from the nature of the judicial function. It seems probable that the Framers intended that the Supreme Court would exercise this power in some form, but there is no way of being certain and it is extremely doubtful that they envisioned the authority in its present form. Nevertheless, although both this right and the right to review state acts were once seriously questioned, [illegible] has firmly entrenched [illegible] the American governmental system [illegible] therefore be described as the most powerful court in the world.

III [illegible]ROTECTION OF INDIVIDUAL RIGHTS

Th[illegible] als is to be fo[illegible] original [illegible] Eight and [illegible] is de[illegible] Constit[illegible] includ[illegible] Thirte[illegible] Fift[illegible] corpus voted to [illegible]tion ing the gua[illegible] laws (which [illegible]able of bill[illegible] under impo[illegible] law when [illegible] half or [illegible] judicial impair[illegible] century [illegible] on was the [illegible] be taken constr[illegible] all ably. The First Amendment [illegible] science and expre[illegible]lation literally [illegible] refrain touching fr[illegible]ndment [illegible] the Supreme Court regards In effect th[illegible] unless the Supreme C[illegible] from passing such l[illegible]

LETTER OF THE CONVENTION TO CONGRESS

In Convention September 17 1787

SIR

WE HAVE NOW THE HONOR to submit to the consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable

The friends of our country have long seen and desired that the power of making war peace and treaties of levying money and regulating commerce and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union but the impropriety of delegating such extensive trust to one body of men is evident— Hence results the necessity of a different organization

It is obviously impracticable in the federal government of these States to secure all rights of independent sovereignty to each and yet provide for the interest and safety of all— Individuals entering into society must give up a share of liberty to preserve the rest The magnitude of the sacrifice must depend as well on situation and circumstances as on the object to be obtained It is at all times difficult to draw with precision the line between those rights which must be surrendered and those which may be reserved and on the present occasion this difficulty was increased by a difference among the several States as to their situation extent habits and particular interests

In all our deliberations on this subject we kept steadily in our view that which appears to us the greatest interest of every true American the consolidation of our Union in which is involved our prosperity felicity safety perhaps our national existence This important consideration seriously and deeply impressed on our minds led each State in the

RESOLUTION OF THE CONVENTION

[September 17, 1787]

In Convention Monday September 17th 1787

PRESENT *The States of New Hampshire Massachusetts Connecticut Mr Hamilton from New York New Jersey Pennsylvania Delaware Maryland Virginia North Carolina South Carolina and Georgia*

Resolved That the Constitut on be laid before the United States in Congress assembled and that it is the opinion of this convent on that it should afterwards be submitted to a convention of delegates chosen in each State by the people thereof under the recommendation of its legislature for their assent and ratification and that each convention assenting to and ratifying the same should give notice thereof to the United States in Congress assembled.

Resolved That it is the opinion of this convention that as soon as the conventions of nine States shall have ratified this Constitut on the United States in Congress assembled should fix a day on which electors should be appointed by the States which shall have ratified the same and a day on which the electors should assemble to vote for the President and the time and place for commencing proceedings under this Constitution that after such publication the electors should be appointed and the senators and representatives elected that the electors should meet on the day fixed for the election of the President, and should transmit their votes certified signed sealed and directed as the Const tution requires to the secretary of the United States in Congress assembled that the senators and representatives should convene at the time and place assigned that the senators should appoint a president of the Senate for the sole purpose of receiving opening and counting the votes for Pres dent and that after he shall be

Convention to be less rigid on points of inferior magnitu than might have been otherwise expected and thus the Co stitution which we now present is the result of a spirit of amity and of that of mutual deference and concession which the peculiarity of our political situation rendered indisp sable

That it will meet the full and entire approbation of every State is not perhap to be expe te l but each will doubtless consider that had her intere t alone been c nsulted the conse quences might hi c been particularly di agreeable or injuri ous to oth r that it i liable to a fev exceptions as could reasonably have been expect d v c hope an l believe that it may promote the la ting welfar f that ountry so dear to us all and se ure her freed m n l happine s our most ardent wish

With great re pect
W h ve th hon r to b

IR
Your Excellen y m st
Obed ent an l Humble Servants
George W hington *President*

By Unanimou Or l r of the C nvention
Hi Excellency
The Pre ident of Congress

RESOLUTION OF THE CONVENTION

[*September 17 1787*]

In Convention Monday September 1 th 1787

PRESENT *The States of New Hampshire Massachusetts Con ecticut Mr Hamilton from New York New Jersey Pennsyl an a Delaware Maryland Virginia North Carolina South Carolina and Georgia*

Re olved That the Constitution be laid before the United States in Congress assembled and that it is the opinion of this Convention that it should afterwards be submitted to a convention of delegates chosen in each State by the people thereof under the recommendation of its legislature for their assent and ratification and that each convention assenting to and ratifying the same should give notice thereof to the United States in Congress assembled.

Resolved That it is the opinion of this convention that as soon as the conventions of nine States shall have ratified this Constitution the United States in Congress assembled should fix a day on which electors should be appointed by the States which shall have ratified the same and a day on which the electors should assemble to vote for the President and the time and place for commencing proceedings under this Constitution that after such publication the electors should be appo nted and the senators and representatives elected that the electors should meet on the day fixed for the election of the President and should transmit their votes certified signed sealed and directed as the Constitution requires to the secretary of the United States in Congress assembled that the senators and representat ves should convene at the time and place assigned that the senators should appoint a president of the Senate for the sole purpose of receiving opening and counting the votes for President and that after he shall be

chosen the Congress together with the President without delay proceed to execute this Constitution

By the unanimous order of the convention

GEORGE WASHINGTON *Presidt*

WILLIAM JACKSON *Secretary*

THE CONSTITUTION OF THE UNITED STATES

WE THE PEOPLE OF THE UNITED STATES IN ORDER TO FORM A MORE PERFECT UNION ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILITY PROVIDE FOR THE COMMON DEFENCE, PROMOTE THE GENERAL WELFARE, AND SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY DO ORDAIN AND ESTABLISH THIS CONSTITUTION FOR THE UNITED STATES OF AMERICA.

ARTICLE I

SECTION 1 All legislati e Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives

SECTION (1) The House of Representatives shall be composed of Members chosen every second Year by the People of the several States and the Electors in each State shall have the Qualifications requ site for Electors of the most numerous Branch of the State Legislature

( ) No person hall be a Representative who shall not have ittained to the Age of Twenty f ve years and been seven Years : Citizen of the Un ted States and who shall not when elected be an inhabitant of that State in which he shall be chosen

(3) Representatives and d rect Taxes shall be apportioned among the several States v hich may be included within this Union according to their respective Numbers which shall be determined by add ng to the whole Number of free Persons nclud n those bound to Service for a Term of Years and ex clud ng Indians not taxed three fifths of all other Persons Tl e actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States and within every subsequent Term of ten Years in such Man

(5) The Senate shall chuse their other Officers and also a President pro tempore in the Absence of the Vice President or when he shall exercise the Office of President of the United States

(6) The Senate shall have the sole Power to try all Impeach ments When sitt ng for that Purpose they shall be on Oath or Affirmation When the President of the United States is tried the Cl ief Justice shall preside And no Person shall be convicted v ithout the Concurrence of tv o thirds of the Mem bers present.

(7) Judgment in Cases of Impeachment shall not extend further than to removal from Office and disqualification to hold and enjoy any Office of honor Trust or Profit under the United States but the Party convicted shall nevertheless be liable and subject to Ind ctment Trial Judgment and Pun ishment accord ng to Law

SECTION 4 (1) The Times Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof but the Congress may at any time by Law make or alter such Regulations except as to the Places of chusing Senators

(2) The Congress shall assemble at least once in every Year and such Meet ng shall be on the first Monday in December unless they shall by Lav appoint a different Day

SECTION 5 (1) Each House shall be the Jud e of the Elec t ons Returns and Qual fications of its ov n Members and a Majority of each shall constitute a Quorum to do Business but a smaller Number may adjourn from day to day and may be authorized to compel the Attendance of absent Members in such Manner and under such Penalties as each House may provide

(2) Each House may determ ne the Rules of its Proceed ngs pun sh its Membe s for disorderly Behavior and with the Concurrence of two thirds expel a Member

(3) Each House shall keep a Journal of its Proceedings and from time to t me publ h the same excepting such Parts as may in their Judgment require Secrecy and the Yeas and

the Votes of both Houses shall be determined by Yeas and Nays and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him the Same shall be a law in like Manner as if he had signed it unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law

(3) Every Order Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States and before the Same shall take Effect shall be approved by him or being disapproved by him shall be repassed by two thirds of the Senate and House of Representatives according to the Rules and Limitation prescribed in the Case of a Bill

SECTION 8 (1) The Congress shall have Power To lay and collect Taxes Duties Imposts and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States but all Duties Imposts and Excises shall be uniform throughout the United States

( ) To borrow money on the Credit of the United States

(3) To regulate Commerce with foreign Nations and among the several States and with the Indian Tribes

(4) To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States

(5) To coin Money regulate the Value thereof and of foreign Coin and to fix the Standard of Weights and Measures

(6) To provide for the Punishment of counterfeiting the Securities and current Coin of the United States

(7) To establish Post Offices and post Roads

(8) To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries

(9) To constitute Tribunals inferior to the Supreme Court

(10) To define and Punish Piracies and Felonies committed

be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.

(3) No Bill of Attainder or ex post facto Law shall be passed.

(4) No Capitation or other direct tax shall be laid unless in Proportion to the Census or Enumeration herein before directed to be taken.

(5) No Tax or Duty shall be laid on Articles exported from any State

(6) No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another nor shall Vessels bound to or from one State be obliged to enter clear or pay Duties in another

(7) No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time

(8) No Title of Nobility shall be granted by the United States And no Person holding any Office of Profit or Trust under them shall without the Consent of the Congress accept of any present Emolument Office or Title of any kind whatever from any King Prince or foreign State

SECTION 10 (1) No State shall enter into any Treaty Alliance or Confederation grant Letters of Marque and Reprisal coin Money emit Bills of Credit make any Thing but gold and silver Coin a Tender in Payment of Debts pass any Bill of Attainder ex post facto Law or Law impairing the Obligation of Contracts or grant any Title of Nobility

(2) No State shall without the Consent of the Congress lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws and the net Produce of all Duties and Imposts laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States and all such Laws shall be subject to the Revision and controul of the Congress

(3) No State shall without the Consent of Congress lay any Duty of Tonnage keep Troops or Ships of War in time of Peace enter into any Agreement or Compact with another

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one Vote A quorum for this Purpose shall consist of a Mem ber or Members from two-thirds of the States and a Majority of all the States shall be necessary to a Choice In every Case after the Choice of the President the person having the great est Number of Votes of the Electors shall be the Vice President But if there should remain two or more who have equal votes the Senate shall chuse from them by Ballot the Vice President

(3) The Congress may determine the Time of chusing the Electors and the Day on which they shall give their Votes which Day shall be the same throughout the United States

(4) No Person except a natural born Citizen or a Citizen of the United States at the time of the Adoption of this Con stitution shall be eligible to the Office of President neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years and been fourteen Years a Resident within the United States

(5) In Case of the Removal of the President from Office or of his Death Resignation or Inability to discharge the Powers and Duties of the said Office the same shall devolve on the Vice President and the Congress may by Law provide for the Case of Removal Death Resignation or Inability both of the President and Vice President declaring what Of ficer shall then act as President and such Officer shall act ac cordingly until the Disability be removed, or a President shall be elected

(6) The President shall at stated Times receive for his Service a Compensation which shall neither be encreased nor diminished during the Period for which he shall have been elected and he shall not receive within that Period any other Emolument from the United States or any of them

(7) Before he enter on the Execution of his Office he shall take the following Oath or Affirmation — I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States and will to the best of my Ability pre serve protect and defend the Constitution of the United States

SECTION 2 (1) The President shall be Commander in Chief

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SECTION

(1) The President shall be Commander in Chief

ARTICLE III

SECTION 1 The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish The Judges both of the supreme and inferior Courts shall hold their Offices during good Behaviour and shall at stated Times receive for their Services a Compensation which shall not be diminished during their Continuance in Office

SECTION 2 (1) The judicial Power shall extend to all Cases in Law and Equity arising under this Constitution the Laws of the United States and Treaties made or which shall be made under their Authority —to all Cases affecting Ambassadors other public Ministers and Consuls —to all Cases of admiralty and maritime Jurisdiction —to Controversies to which the United States shall be a party —to Controversies between two or more States —between a State and Citizens of another State —between Citizens of different States —between Citizens of the same State claiming Lands under Grants of different State and between a State or the Citizens thereof and foreign States Citizens or subjects

(2) In all Cases affecting Ambassadors other public Ministers and Consuls and those in which a State shall be a Party the Supreme Court shall have original Jurisdiction In all the other Cases before mentioned the supreme Court shall have appellate Jurisdiction both as to Law and Fact with such Exceptions and under such Regulations as the Congress shall make

(3) The Trial of all Crimes except in Cases of Impeachment shall be by Jury and such Trial shall be held in the State where the said Crimes shall have been committed but when not committed within any State the Trial shall be at such Place or Places as the Congress may by Law have directed

SECTION 3 (1) Treason against the United States shall consist only in levying War against them or in adhering to their Enemies giving them Aid and Comfort. No person shall be

any Claims of the United States or of any particular State

SECTION 4 The United States shall guarantee to every State in this Union a Republican Form of Government and shall protect each of them against Invasion and on Application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic Violence

ARTICLE V

The Congress whenever two thirds of both Houses shall deem it necessary shall propose Amendments to this Constitution or on the Application of the Legislatures of two thirds of the several States shall call a Convention for proposing Amendments which in either Case shall be valid to all Intents and Purposes as Part of this Constitution when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof as the one or the other Mode of Ratification may be proposed by the Congress Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article and that no State without its Consent shall be deprived of its equal Suffrage in the Senate

ARTICLE VI

(1) All Debts contracted and Engagements entered into before the Adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation

(2) This Constitution and the Laws of the United States which shall be made in pursuance thereof and all Treaties made or which shall be made under the Authority of the United States shall be the supreme Law of the Land and the Judges in every State shall be bound thereby any Thing in the Constitution or Laws of any State to the Contrary notwithstanding

Pennsylvania

B FRANKLIN
THOMAS MIFFLIN
ROBT MORRIS
GEO CLYMER
THOS FITZSIMONS
JARED INGERSOLL
JAMES WILSON
GOUV MORRIS

Delaware

GEO READ
GUNNING BEDFORD JUN
JOHN DICKINSON
RICHARD BASSETT
JACO BROOM

Maryland

JAMES MCHENRY
DAN OF ST THOS JENIFER
DANL CARROLL

Virginia

JOHN BLAIR
JAMES MADISON JR

North Carolina

WM BLOUNT
RICHD DOBBS SPAIGHT
HU WILLIAMSON

South Carolina

J RUTLEDGE
CHARLES COTESWORTH PINCKNEY
CHARLES PINCKNEY
PIERCE BUTLER

Georgia

WILLIAM FEW
ABR BALDWIN

Attest

WILLIAM JACKSON *Secretary*

shall not be violated and no Warrants shall issue but upon probably cause supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized

ARTICLE V

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces or in the Militia when in actual service in time of War or public danger nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb nor shall be compelled in any Criminal Case to be a witness against himself nor be deprived of life liberty or property without due process of law nor shall private property be taken for public use without just compensation

ARTICLE VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence

ARTICLE VII

In Suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law

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In Suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

LATER AMENDMENTS

ARTICLE XI
[January 8, 1795]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII
[September 25, 1804]

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at

least shall not be an inhabitant of the same state with them selves they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice President and they shall make distinct lists of all per sons voted for as President and of all persons voted for as Vice President and of the number of votes for each which lists they shall sign and certify and transmit sealed to the seat of the government of the United States directed to the Pres ident of the Senate —The President of the Senate shall in presence of the Senate and House of Representatives open all the cert ficates and the votes shall then be counted —The person having the greatest number of votes for President shall be the Pres dent if such number be a majority of the whole number of Electors appointed and if no person have such majority then from the persons having the highest numbers not exceeding three on the list of those voted for as President the House of Representatives shall choose immediately by ballot, the President But n choosing the President the votes shall be taken by states the representation from each state having one vote a quorum for this purpose shall consist of a member or members from two thirds of the states and a majority of all the states shall be necessary to a choice. And f the House of Representatives shall not choose a President whenever the right of choice hall devolve upon them before the fourth day of March next following then the Vice Presi dent shall a t as President as in the case of the death or other constitutional disab l ty of the President The person having the greatest number of votes as V ce Pres dent shall be the Vice President if such number be a majority of the whole number of Electors appo nted and if no person have a ma jority then from the t o h ghest numbers on the list th Senate shall choose the V ce Pres dent a quorum for the pur pose shall consist of two th rds of the whole number of Sena tor and a major ty of the whole number shall be necessary to a cho ce But no person const tutionally inel gible to the office of Pres dent shall be el gible to that of Vice President of the Un ted States

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[September 25 1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice President one of whom at

least shall not be an inhabitant of the same state with themselves they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice President and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each which lists they shall sign and certify and transmit sealed to the seat of the government of the United States directed to the President of the Senate —The President of the Senate shall in presence of the Senate and House of Representatives open all the certificates and the votes shall then be counted —The person having the greatest number of votes for President shall be the President if such number be a majority of the whole number of Electors appointed and if no person have such majority then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately by ballot, the President. But in choosing the President the votes shall be taken by states the representation from each state having one vote a quorum for this purpose shall consist of a member or members from two thirds of the states and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March next following then the Vice President shall act as President as in the case of the death or other constitutional disability of the President The person having the greatest number of votes as Vice President shall be the Vice President if such number be a majority of the whole number of Electors appointed and if no person have a majority then from the two highest numbers on the list the Senate shall choose the Vice President a quorum for the purpose shall consist of two thirds of the whole number of Senators and a majority of the whole number shall be necessary to a choice But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States

in Congress or elector of President and Vice President or hold any off ce civil or military under the United States or under any State, who having previously taken an oath as a member of Congress or as an off cer of the United States or as a mem ber of any State legislature or as an executive or judicial officer of any State to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same or gi en aid or comfort to the enemies thereof But Congress may by a vote of tv o thirds of each House remove such disability

Section 4 The val dity of the public debt of the United States authorized by la including debts incurred for pay ment of pensions and bounties for services in suppressing in surrection or rebellion shall not be questioned But neith r the United States nor any State shall assume or pay any debt or obligation ncurred in aid of insurrect on or rebellion against the United States or any claim for the loss or emanci pation of any slave but all such debts ol l gations and claims shall be held illegal and void

Section 5 The Congress shall have pov er to enforce by appropriate legislation the provisions of this article

Article XV
[Mar 1 30 1970]

Section 1 The right of c tizen of the United States to vote hall not be denied or abridged by the United States or by any State on ac unt of race color or pre ous condition of ervitude

Section The Congres shall have power to enforce this article by appropr ate legislat on

Article XVI
[F bru ry 25 1913]

The Congress shall have the power to lay and collect taxes on incomes from whatever source derived without appor

in Congress, or elector of President and Vice President or hold any off ce civil or military under the United States or under any State who having previously taken an oath as a member of Congress or as an officer of the United States or as a member of any State legislature or as an executive or judicial officer of any State to support th Constitution of the United States shall have engaged in insurrection or rebellion against the same or g ven aid or comfort to the enemies thereof But Congress may by a vote of two thirds of each House remove such disabil ty

Sect on 4 The validity of the public debt of the United States authorized by law including debts incurred for payment of pensions and bounties for services in suppressing insurrect on or rebellion shall not be quest oned But neith r the United States nor any State shall assume or pay any debt or obligat on incurred in aid of insurrection or rebellion against the United States or any claim for the loss or emancipation of any slave but all such debts obligations and claims shall be held illegal and void.

Section 5 The Congress shall have power to enforce by appropriate legislation the provisions of this article.

ARTICLE XV

[*March 30 1870*]

Sect on 1 The right of c tizens of the United States to vote hall not be den ed or abridged by the United States or by any State on account of race color or previous condit on of servitude

Section 2 The Congress shall have power to enforce this article by appr priate legislation

ARTICLE XVI

[*February 25 1913*]

The Congress shall have the power to lay and collect taxes on incomes from whatever source derived without appor

the legislatures of the several States, as provided in the Constitution within seven years from the date of the submission hereof to the States by the Congress.

Article XIX

[August 26 1920]

Section 1 The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Section 2 Congress shall have power to enforce this article by appropriate legislation.

Article XX

[February 6 1933]

Section 1 The terms of the President and Vice President shall end at noon on the twentieth day of January and the terms of Senators and Representatives at noon on the third day of January of the years in which such terms would have ended if this article had not been ratified and the terms of their successors shall then begin

Section 2 The Congress shall assemble at least once in every year and such meeting shall begin at noon on the third day of January unless they shall by law appoint a different day

Section 3 If at the time fixed for the beginning of the term of the President the President elect shall have died the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term or if the President elect shall have failed to qualify then the Vice President elect shall act as President until a President shall have qualified and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified declaring who shall then act as President or the manner in which one who

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[August 6 1920]

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office of President, or acted as President, for more than two years of a term to which some other person was elected Presi dent shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be hold ing the office of President or acting as President during the term within which this Article becomes operative from hold ing the office of President or acting as President during the remainder of such term

Section This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three fourths of the several States within seven years from the date of its submission to the States by the Congress

is to act shall be selected and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4 The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them

Section 5 Sections 1 and 2 shall take effect on the fifteenth day of October following the ratification of this article

Section 6 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three fourths of the several States within seven years from the date of its submission

ARTICLE XXI

[December 5 19]

Section 1 The eighteenth article of amendment to the Constitution of the United States is hereby repealed

Section The transportation or importation into any State Territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited

Section 3 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States as provided in the Constitution within seven years from the date of the submission hereof to the States by the Congress

ARTICLE XXII

[March 1 1951]

Section 1 No person shall be elected to the office of the President more than twice and no person who has held the